EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

NO. 8044.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRICAL RESEARCH PRODUCTS, INC., a corporation,

Appellant,

vs.

W. D. GROSS,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FIRST DIVISION.

BRIEF FOR APPELLEE

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SUBJECT INDEX

INDEX OF AUTHORITIES AND STATUTES CITED

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STATEMENT OF FACTS.

This is an action of replevin brought by the appellant against the appellee to recover possession of certain theatre equipment. The appellee answered and set up several counter-claims, on which he recovered judgment.

The appeal is prosecuted to reverse the judgment so obtained. The principal point in the case is whether the appellee was obliged to pay appellant what are referred to as service charges.

The appellee Gross, had, at the time of the trial, been engaged in the motion picture theatre business for a period of thirty-three years. He had been engaged in that business at Ketchikan ever since 1908, and at Juneau ever since 1910. He bought the property and rebuilt the present Coliseum Theatre in Juneau in about 1912, and built the present Coliseum Theatre in Ketchikan during 1924. (Pr. R. P. 317).

In about February of 1929, appellee Gross signed plaintiff's Exhibit 1, which had at that time not yet been signed by plaintiff (appellant). He sent it by mail to plaintiff's main office, and received a copy, signed by plaintiff, sometime in April, 1929. (Printed Rec. Page 317).

Plaintiff's Ex. No. 1 is a contract between the parties, in which the appellant is referred to as "Products" and the appellee as the "Exhibitor." It is upon a printed form. Some of the blank spaces, occurring in this printed form, had been filled in and others left blank at the time the contract was executed.

Under the contract "Products" agrees to install motion picture sound equipment of a designated type in the "Exhibitor's" Coliseum Theatre at Juneau, per-

form certain services with respect thereto, and to permit the "Exhibitor" to use the equipment for a period of ten years. In consideration of this the "Exhibitor" agrees to pay "Products" the sum of ten thousand five hundred ($10,500) dollars.

The agreement is long and contains many provisions, among others, the following:

Paragraph 2 provides in part as follows: "Also, in order further to secure proper functioning of the equipment as aforesaid, satisfactory to the parties hereto, it is agreed that all additional and renewal parts and assembled parts for the equipment shall be obtained from Products."

Paragraph 4, which is entitled, "Instruction and Inspection Service", reads as follows: "Products agrees to instruct the motion picture machine operators of the Exhibitor in the manner and method of operating the Equipment, and will issue to each operator who has, in its opinion, satisfactorily completed a course in instruction in the operation of the Equipment, a certificate to that effect. Products further agrees, in order to perfect such instruction, and also in order to superintend the operation of the Equipment, to keep in attendance at the Theatre during hours of performance and at such additional hours as may be necessary, an engineer or other person skilled in such operation for a period of one week following the day upon which the

installation is completed and the Equipment made available to the Exhibitor as ready for public exhibition. Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed. Products may from time to time install such spare and renewal parts as may, in its opinion, be necessary to the satisfactory operation and maintenance of the Equipment."

Paragraph 6, in which all the blank spaces occurring in the printed form have been left blank, is as follows: "In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be $———— per week, which charge shall not be exceeded during the first two years of said license and thereafter for the balance of the term of said license shall not exceed the sum of $———— per week."

Paragraph 8 provides as follows: "The Exhibitor agrees to pay to Products its list installation charges

as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof, and to pay the transportation charges thereon. The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for."

Paragraph 12 provides as follows: "The Exhibitor will permit Products, through its designated agents, engineers and mechanics, to have access to the Theatre at all reasonable hours, for the purpose of installing and from time to time for the purpose of examining and inspecting the Equipment, and will grant to Products full opportunity to make such adjustments therein and repairs thereto as, in the opinion of Products, are necessary or desirable."

Paragraph 20 provides in part as follows: "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates."

Paragraph 23, which is a typewritten addition to the printed form, reads as follows: "It is hereby agreed that a certain agreement for the installation and licensing of Western Electric Sound Projector Equipment in the Coliseum Theatre at Juneau, Alaska, between Products and the Exhibitor dated July 28, 1928, be and the same hereby is in all respects terminated." (Pr. R. P. 170 et seq.).

Plaintiff's Exhibit No. 3 is a contract between the parties differing from Exhibit No .1 in no respect except that it relates to appellee's Ketchikan Theatre instead of his Juneau Theatre.

In explaining the reason why the blank spaces in paragraph 6 were not filled in at the time the contract was executed (in this connection it must be remembered that the blank spaces were never filled in) the witness Anderson, who had signed the contracts for appellant, testified in part as follows: "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts Exhibits No's 1 and 3 of the probable cost of furnishing engineering service for the theatres in that territory; it was consequently unwilling to enter into a contract which would fix the amount of its compensation for the rendering of such service. (Pr. R. P. 169 et seq.).

Before appellee Gross had received his executed

copies of these contracts, he met the appellant's representative Gage, with whom the negotiations leading up to the execution of the contracts had been carried on, in Seattle, and he was told by Gage that the contracts had been signed with the service clause left out and that he, Gross, would have to get his own service man. (Ev. Gross, Pr. R. P. 317 et seq.). The witness Cawthorn, who was with Gross on this occasion, testifies with reference to the conversation as follows: "Mr. Gage called to Mr. Gross, we was on one side of the street and Mr. Gage on the other, met in the middle of the street. Gage informed Mr. Gross that he had got the contracts through with "Erpi" for Mr. Gross, without service charges, and congratulated Mr. Gross on his good fortune in getting equipment for Alaska, told him that the contracts had went through." (Ev. Cawthorn P. R. Page 476). There is no evidence in the Record denying or explaining this particular conversation.

In August, 1929, right after the equipment had been installed, the witness Wilcox, who was then plaintiff's manager for the Western Division and who is now its vice-president, stopped in Juneau, and was asked by the installation engineer whether, the installation having been made, it would be agreeable for him to return to Seattle. Whereupon, Wilcox told him to go as "Mr. Gross has no service with us in Alaska." (Ev. Gross; P. Rec. Page 319). The witness Louis Lemieux testifies that he was present when Wilcox made this statement. He testifies that Taylor, the installation

engineer, expressed a desire to go home and that "Wilcox told him then, if he thought he had the equipment in good running order, he could leave because Gross had no service and there was nothing to stay for." (Ev. Louis Lemieux; Rec. P. Page 802). Wilcox denies having made this statement; but in view of the fact that his having made it is so well established, he must have forgotten about it.

The witness Cawthorn, a qualified motion picture man, was asked what is meant by the term "service" when used with reference to motion pictures, by those engaged in the motion picture business. He gave this answer: " 'Service' as applied to the motion picture machines, and other machines, means to keep those machines in perfect running order, perfect conidtion." "At all times." (P. R. 473). And when asked the meaning of the term "Inspection and minor adjustments," when used by those engaged in the sound equipment business, he testifies: "Inspection could be made for any part of the theatre, that is as far as sound is concerned, the minor adjustments might mean just focusing an exciter lamp or something of that kind, not really repairing anything." (Pr. R. P. 473). The witness then testifies that "repair would be over-hauling, keeping it up," and that he would call that service; but that merely adjusting the machines would be called "minor adjustments." (Pr. R. P.P. 473-474).

The same witness then proceeded to testify that he

had operated Western Electric equipment in his theatre in Seattle, under a contract identical with that of appellee Gross, except that the service clause had been filled in showing what he had to pay, while the service clause in the contracts with Gross had been left blank. With relation to calls by service men and to the service received by him, he says: "We could get him any time of the day or night, we had his telephone number; they supplied us with the telephone number and we could always get a service man; it would not take very long to get there; those weekly visits were on service, but of course sometimes it was merely on inspection but if he found anything that needed service, he serviced it. If there were no repairs made I would call the weekly visits inspections; if the machines needed service he gave them service;" (Ev. Cawthorn; Rec. P. 475).

The witness Clayton, a motion-picture engineer, defines the terms "service" and "minor adjustment" when used by those engaged in the motion picture industry as follows: "Service" to us, means to go out into a house where the equipment is out of repair and put this equipment back into repair. That is what we call service." "Inspection and minor adjustment"—we go into a theatre and look over the equipment that is in repair, look over the equipment, make a few minor adjustments and inspect it and see it is in proper shape so in case there are some small troubles it won't be large enough to shut the equipment down altogether." (P. Rec. P. 783-784).

Mr. Wilcox, vice-president of appellant corporation, testifying with reference to the character of service furnished by appellant, in 1929 and 1930, under its contracts where service was provided for, says: "in the beginning for the first six months of operation in 1929 and 1930 we serviced once a week for the first six months; when I say a week it might have been eight days one time and six another, but approximately every ten days; the second six months and thereafter, approximately every two weeks with the exception of very large deluxe houses, with a seating capacity of upward of 1,500 seats of which there were about 150 in the United States, which were serviced every week; plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the the office and get a service man right away;" (Ev. Wilcox; P. Rec. Page 292).

After appellant's representative Gage told appellee Gross that the contracts had been signed and that he would have to get his own service man, Gross tried to get a service man in Seattle; but being unable to do so, he awaited the arrival of Taylor, the installation engineer who was to install the equipment. Upon Taylor's arrival, he told him that he had good reliable men who had grown up with the business and asked Taylor to instruct them so they would be able to take care of the equipment. (Printed Rec. Page 318).

Gross and Taylor then came to Juneau. Upon reaching Juneau, Gross found the signed copies of the contracts awaiting his arrival. He introduced Taylor to Tuckett, the manager for the Juneau theatre and to Lemieux, afterwards manager for the Ketchikan theatre. These men helped Taylor install the equipment; and as they unpacked it piece by piece, he explained the use of the various parts and instructed them in the operation, repair and upkeep of the equipment. He also left them a book of instructions, and they, on their part, procured other literature with a view of further qualifying themselves. Gross thereupon increased the salary of Tuckett and Lemieux from $150.00 per month to $250.00 per month. (See Ev. Gross; Printed Rec. P. 318; Ev. Tuckett, Printed Rec. P. 672; also Ev. Lemieux, P. Rec. P. 801).

Later Gross employed two experienced sound equipment engineers; they were the witnesses Clayton and Dalner. These men were placed in charge of two other theatres owned by Gross, in nearby Alaskan towns, with the understanding that they would render emergency service to the Juneau and Ketchikan theaters whenever called upon. (Ev. Clayton, P. Rec. Page 784; Ev. Dalner; P. Rec. Page 832).

After the equipment in both theatres had been installed, Taylor left for Seattle; but just before he left, the Juneau equipment got out of order. Taylor, being in a hurry to leave for Seattle, worked on it but did not

repair the equipment. He merely instructed Lemieux to get a new "fader" and install it if the trouble continued. The next day, when there was no engineer of appellants in sight, the trouble became worse, and Lemieux set about to locate it. He found it, and repaired it. (Ev. Lemieux, P. R. Page 806).

Shortly after that, the equipment in Ketchikan broke down entirely. There was no engineer of appellants in sight. Mr. Tuckett made the repairs, with the aid of a local Ketchikan man not connected with appellant. (Ev. Tuckett; P. Rec. Page 675-676).

There were no other serious breakdowns until sometime later when breakdowns became more frequent.

Tuckett, Lemieux, and their subordinates, not only repaired the equipment when out of order, but went over it and inspected it every day, making such adjustments as were necessary; and once a week, on Saturday, they gave the equipment a thorough overhauling. (Ev. Louis Lemieux, P. Rec. Page 803 et seq.; Ev. Ned Lemieux, P. R. Page 826 et. seq.; Ev. Tuckett, P. R. Page 674). Taylor, the installation engineer, directed the men in the employ of Gross to make these daily inspections, and his directions were followed implicitly. (Ev. Ned Lemieux, P. Rec. Page 829).

After Taylor had left, no one connected with the appellant came to Alaska until on or about October 1st,

1929, except an engineer named Albright, who called at the Ketchikan theatre on August 21st, and at the Juneau theatre on August 24th. He came to inspect the equipment and sell merchandise, but he did not service the equipment. (P. Rec. Page 390).

Under date of May 20th, 1929, appellant sent appellee Gross a letter which reads as follows:

"May 20, 1929.

Alaska Film Corp.,
Coliseum Bldg.,
Juneau, Alaska.

ATTENTION: MR. W. D. GROSS

Gentlemen:

The installation of the Western Electric Sound Propector Equipment was completed in your Coliseum Theatre, Juneau, Alaska, on May 10, 1929.

We invite your attention to Paragraph 6 of the agreement which provides that the first two weekly payments shall be due and payable on the Saturday following the completion of the installation and thereafter weekly in advance.

As a matter of courtesy, maturity notices of amounts due each week will be forwarded to you, but failure to receive such weekly notices does not in any way relieve you of the obligation to make the weekly payments as provided.

Kindly arrange to issue the necessary in-

structions to forward checks to this office.

Yours very truly,

ASSISTANT CREDIT MANAGER."

(Ev. P. R. Page 932).

Referring to this letter, Vice-President Wilcox testifies as follows: "H. N. Bessey signed that letter, which is a standard form of letter sent to all exhibitors as soon as plaintiff's Credit Department in New York receives notice that an installation is completed, in order to notify the exhibitor when the service day is." (Ev. Wilcox, P. Rec. Page 933).

No "maturity notices of amounts due each week," or other claims, demands, or statements relating to service charges were sent appellee Gross by appellant until the following September. In the meantime, under date of August 7, 1929, Appellant wrote appellee a letter urging him to buy some $800.00 worth of spare parts for each of the theatres in order to keep them protected against accidental shut-downs. The letter reads in part as follows:

> "* * * We will furnish each one of these theatres with an electric soldering iron without additional charge, to be held in the spare parts cabinets for use on our equipment.
>
> Although we carry all of these items in our Seattle stock as regular emergency replacement equipment, it would take so long to get them to Juneau and Ketchikan that the shortage of these

items might at some time cause you and your audience inconvenience, if they were not readily available.

Yours very truly,
WESTERN DIVISION MANAGER."
(P. Rec. Page 357).

Under date of September 12, 1929, appellant wrote appellee the following letter:

"September 12th, 1929.

Mr. W. D. Gross,
Care Coliseum Theatres,
Juneau, Alaska.

RE: Coliseum Theatre,
Juneau, Alaska,
Ketchikan, Alaska.

Dear Sir:

Enclosed you will find statement on the Coliseum Theatre at Juneau, Alaska, showing due the sum of $541.10 and on the Coliseum Theatre at Ketchikan, Alaska, showing due the sum of $481.-60. You will also notice that we have added to these statements ten additional weeks at the rate of $29.75, as we assume that it will take at least that time to receive your reply with remittance enclosed.

Upon receipt of this letter will you please place in the mail your remittance for $836.60 on the Juneau account and $779.10 on the Ketchikan account so that we may bring these accounts up to date without further delay.

We also suggest that you arrange to mail your remittance weekly in advance as provided in your

agreement and it would also assist us if you would write us explaining in detail the mailing time from your town to this city so that we may know just when to expect your remittance.

Your prompt attention will be appreciated.

Yours very truly,

R. HILTON,
Collection Department."
(P. R. P. 680-681).

Accompanying this letter were two statements: one for Juneau, claiming service charges at $29.75 per week from May 12 up to Sept. 14—18 weeks; and one for Ketchikan claiming service charges at $29.75 per week for something over sixteen weeks. Each statement also contains an item of $297.50, which is for an additional ten weeks which the appellee is asked to pay in advance. (P. R. Page 682-683).

Referring to the foregoing letter and statements, the witness Tuckett testifies: "I never received any statement or letter with respect to service charges before that letter." (Ev. Tuckett, P. R. Page 684). (Ev. Gross, P. R. Page 320).

The appellant did not offer any evidence tending to show that it had made any claim for service charges prior to this letter of September 12, unless it be contended that the letter of May 12 above set forth amounts to such claim; but Mr. Wilcox testified that this was merely a standard letter sent out by the Credit Depart-

ment in such cases upon receiving notice that an installation had been completed, and it merely called attention to paragraph Six, which, in the case of appellee's contract, did not provide for the p a y m e n t of any amount.

The appellee went East in the fall of 1929 before the letter and statements of September 12, relating to service charges, had reached Juneau. After the appellee had left for the East, his manager at Juneau also received from appellant proposed contracts, Exhibits 2 and 4, which are later set forth at length. Manager Tuckett wired appellee in regard to the claim for service charges, and sent the proposed contracts forward to him by mail; but the letter containing them did not reach appellee and it was eventually returned to Juneau. (P. R. Page 320).

Appellee Gross tells what happened in the following language: "I left Juneau some time in September, 1929, and hadn't heard anything about service charges or received any bill for service charges before I left; the first time I heard anything about a claim for service charges was Tuckett wired me in the East some time in October, 1929; I then left for Chicago because I figured to see Wilcox on account of his statement to me and Lemieux that I don't have service, but I didn't see him; I talked to some man, I don't know who he was, about service, and learned from him to go to Seattle and to take up the matter with Gage; I went to New York but

I didn't go see plaintiff; I returned by way of Los Angeles to Seattle and arrived in Seattle some time in December, 1929; I never saw plaintiff's exhibits 2 and 4 until I reached Seattle; I saw it in Gage's office; I had not received the mail Tuckett had forwarded me; I had been traveling about too much; I called to see Gage right away in regard to these service charges. (P. R. P. 320).

Whereupon the following proceedings took place:

Q. When you came into Mr. Gage's office, and after you met him and talked to him, knew him,—what, if anything, did you say with reference to service?

A. I asked him "What is the idea of charging me for service when I never signed up for service." He claimed he can't help himself, plaintiff is writing him right along and he has to write me at same time; we talked quite a little; I can't remmeber exactly all that he said; he has to get the money or they are going to pull out all the machines; Gage said he received a letter from plaintiff they wanted me to sign it to make it a part of the contract and he gave me those letters, plaintiff's exhibits Nos. 2 and 4, to sign; if I don't sign he threatened to take the machines out, same thing as if a person has a telephone and doesn't pay for the telephone, the telephone system would disconnect him; he spoke about paying back service charges; I told him I didn't owe service charge, didn't see why I should pay a service charge from the day I got the machines, and he said that is what the company wants, and he would take the

machines out if I didn't pay; if I don't pay the money he would notify his attorney to pull out both machines at Juneau and Ketchikan and if I didn't sign the contracts; I then signed the contracts and paid him the money.

Whereupon the following proceedings were had:

Q. At that time, Mr. Gross, what was the condition of your business, in Juneau and Ketchikan? How would your business in Juneau and Ketchikan be affected by taking out those machines?

A. I would say they would destroy the business if they took out those machines.

Q. In both places?

A. Yes.

Q. Did you know what your rights were under the contract at that time—whether he had a right to take them out or not?

A. I presume I did—I understood that they could do that.

Q. You understood he could take them out?

A. Yes.

Q. Did Gage tell you anything about that?

A. Yes.

Q. What was it?

A. He said if I didn't pay the money and sign the contract he would tear the machines out.

Q. Did he tell you anything about his power to do it?

A. He said he had power to do it.

Q. Did you know whether he had power to do it?

A. Yes I did, he did have power to do it.

Q. You believed he had power?

A. I believed he did.

Q. Did you know anything about the law?

A. Not at that time, I don't know much about the law.

Q. Did you believe he had the power to do it?

A. Yes sir.

Whereupon defendant Gross further testifies: "I owed plaintiff for five months that we hadn't paid yet but I didn't owe him anything that was due at that time; I had done everything the contract called for; there was still five months unpaid but the payments had been kept up right along; I didn't owe them anything on the Juneau contract of March 28, 1929, nor the Ketchikan contract of March 28, 1929, but had paid everything due under them to that time; I performed everything required of me under those contracts; when I signed the application for those contracts I paid $1,130.00 on deposit; these payments that fell due were made in twelve payable notes that are described in the contract and at that time I had paid seven of them and interest also; I believed Gage had the power and would take the machines out."

Q. Was there anything that led you to sign those contracts except the threats of Mr. Gage—in

other words, would you have signed the contracts except for the threats of Mr. Gage?

A. No.

Thereupon Witness Gross further testifies: "I never saw Anderson, the man whose deposition has been read in this case; I can't recollect whether I ever wrote him or not; Gage never told me who Anderson was; after the contracts had been signed by me and the money paid to Gage, the latter told me he was going to try to persuade the company to put a man in Juneau and one in Ketchikan to take care of my service but they never did." (Ev. Gross, Pr. R. P. 321 et seq.).

No other talking machines were available in December, 1929, when I signed plaintiff's Exhibits 2 and 4. (Pr. R. P. 325).

The witness Cawthorne, who was the representative of Gross at Seattle at that time, and who accompanied him on the occasion of his visit to the office of Gage, relates what happened in the following language:

A. Well, as soon as we came into the office, Mr. Gage was sitting there and he greeted Mr. Gross and I, and Mr. Gross wanted to know what all this rumpus about service charges was, said he had received a wire from his manager in Ketchikan stating the Western Electric was trying to collect some kind of service charge and wanted to know what it was all about. Mr. Gage stated the company was now in a position to render service up

there and they was demanding him that he pay service charges. Mr. Gross argued he had no service charges and was trying to verify the fact by Mr. Gage. The argument was quite lengthy and quite heated, they got pretty warm on both sides for quite a while. Finally, Mr. Gage said that he had no alternative that the company wanted these services and he was only working for the company and he had to obey or do as they told him, so he said, "There is no out, you have got to pay these service charges and sign" an agreement of some kind.

Q. Did he bring out the agreements?

A. And with that he pushed a couple of sheets or a couple of documents across the table and told Dave that he had to sign those papers and pay the money right then or he would not accept any more money either on the contract or anything unless the services were paid and those papers signed. Mr. Gross and I we started—

Q. Did he say anything further about the equipment?

A. Well, yes, he did. We started arguing among ourselves. He turned around and says, "There is no use in arguing, this thing. If you don't sign those papers, pay this money, Dave, they will come up there and tear your equipment out just like the telephone man tears the phone off the wall if the telephone isn't paid for.

Q. Did he say "he" or "they" would do it?

A. I wouldn't say whether "he" or "they"—

that the Western Electric Company would do it.

Q. Then what happened?

A. Mr. Gross and I went into conference, and he brought out the fact Mr. Gross didn't have all of his original—that is all of the payments on his original purchase or contract made, and that if he didn't or wouldn't accept any more money on it he was afraid they could and would take the machines away from him.

MR. ROBERTSON: I move to strike as a conclusion, that "he was afraid they would take them out" as not proper testimony.

THE COURT: Motion sustained.

A. Mr. Gage was sitting right across the table from him.

THE COURT: Was he present?

A. Yes, he was.

THE COURT: Very well.

A. So he decided then that, or we, Gross and I, decided Mr. Gage did have the authority and would take the machines away from him, so with that he paid the money demanded, some nine hundred and some odd dollars and signed the documents.

Q. Both papers?

A. Both papers.

Q. What, if anything further, did Mr. Gage say at that time with relation to service?

A. He got friendly with Mr. Gross again then and congratulated Mr. Gross on his good

> judgment; and said that was the best thing he ever done and he said, "Now you are going to get service at Ketchikan and Juneau," and he said that he would establish an office in Juneau with a service man in both Ketchikan and Juneau.
>
> (Ev. Cawthorne, P. Rec. Page 477 et seq.).

Appellant's witness Gage testified upon this point as follows: "We conversed and Gross again asked that I take up with my home office the matter of having his own men service the equipment; I told him this had been done and the decision was final, that they refused to permit anyone outside of their own engineers to service the equipment; I didn't threaten him at all; I told him frankly that he must live up to the terms of his agreement or return the equipment; I said: 'If you don't want to carry out your agreement, all right.' I used such illustrations as 'if you do not pay your telephone bill, your telephone will be disconnected.' I pointed out to him that in accordance with his contract he was already in default and that it was only our leniency that kept him going as long as he did; without undue persuasion he signed the agreement and paid for thirty-two weeks' back service charges, together with some small accounts, bill of approximately $15.00; we discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payments of weekly service charges." (P. Rec. Page 928).

The undisputed evidence is that at this time the appellee had a large and profitable business at both the Juneau and Ketchikan theatres, which would be interrupted if the equipment were taken out.

The appellee Gross did not know at the time what effect the threats that Gage had made had upon the legality of the supplemental contracts. He did not know this until he consulted an attorney sometime later. (Ev. Gross, P. Rec. Page 356).

One of the supplemental contracts signed by appellee on the occasion above referred to was received in evidence and marked plaintiff's Ex. 2. It is written upon letter paper and the letter head of appellant and the exhibit reads as follows:

"ELECTRICAL RESEARCH PRODUCTS INC.
Acoustic Department
250 West 57th Street, New York, N. Y.
Subsidiary of
Western Electric Company
Incorporated

September 4, 1929.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of

Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such Payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be $29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means

of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,

(Signed) R. E. ANDERSON,
Comptroller.

Accepted: W. D. Gross,
Exhibitor's signature witnessed by:
J. A. GAGE."

(P. R. P. 27 et seq.).

The other supplemental contract signed at the same time under the same circumstances was received in evidence as plaintiff's Ex. 4. It is exactly like exhibit 2 except that it relates to the Ketchikan theatre, while exhibit 2 relates to the Juneau theatre.

There is some other evidence, scattered through the Record, relating to duress. The question of whether the threats and conduct of Gage amounted to duress under the circumstances testified to by the witnesses, was submitted to the jury under appropriate instructions, and the issue was found against the appellant. No error is assigned in connection with the giving of these instructions.

Appellant does not claim to have sent a service man to Alaska between the times that the supplemental contracts were signed, in December 1929, and the 24th

day of February, 1930; although there is some evidence that a man named Smith, for whose visit appellant claims no credit, passed through Ketchikan and Juneau on his way to Western Alaska, in the meantime.

During January, 1930, there was a short circuit in the Juneau equipment which made it impossible to use the disc. Gross had, immediately after signing the supplemental contracts, wired Tuckett that he had "signed for service." Tuckett wired appellant's Seattle office as follows:

JUNEAU, ALASKA, JAN. 17, 1930.

COLLECT BLACK
ELECTRICAL RESEARCH PRODUCTS
458 SKINNER BLDG SEATTLE

WE HAVE A SHORT IN OUR EQUIPMENT WHEN WE THROW LEVER FROM FILM TO DISC WE BLOW OUT FUSE IN BATTERY ROOM CAN'T USE DISC FILM SIDE OKAY ADVISE HOW TO FIND TROUBLE MUST KNOW AS IT IS IMPOSSIBLE TO GET SERVICE MAN HERE IN TIME

COLISEUM THEATRE"

R. P. 677).

On the same day the Seattle office answered, giving some instructions as to how to find the trouble, and advising that a service man named Smith was on the steamer Northwestern going North.

Two days later on the 19th, Smith wired to meet him when ship arrived on following Monday. (Pr. R. P. 677-678).

Before receiving either of these telegrams, however, Ned Lemieux, an operator under Tuckett, had the good fortune of locating the trouble, so as to be able to repair it and keep the theatre running. (Pr. R. P. 678).

On her way North, the Northwestern, carrying Smith, stopped in Ketchikan 16 hours. Smith came ashore in an intoxicated condition, went through the theatre at high speed, inquired for a bootlegger, and disappeared. (Ev. Louis Lemieux, Pr. Rec. Page 809.)

Eventually, the Northwestern reached Juneau. Ned Lemieux went to meet Smith at the appointed place, but Smith did not make his appearance until just before the steamer left. Upon learning that the equipment had been repaired, he told Lemieux that he was on his way to the Westward to install equipment for Capt. Lathrop in a string of theatres and that he had the equipment with him on the ship. He then asked Lemieux to sign a blank service report, which he said he would fill in later. Smith told Lemieux that it was the intention to keep a stock of spare parts at Juneau and have a service man stationed there all the time, and that he would provide for all this on his way south. But he never did. (Ev. Ned Lemieux, Pr. Rec. Page 824-825.)

About two or three weeks later, the Juneau theatre had a loose connection in the equipment. They wired advising appellant that they had a loose connection and asking when service man would arrive, and also inquired why spare parts ordered had not been sent. All appellant did to meet the situation is indicated in certain telegrams testified to by appellant's witness Briggs. The Los Angeles office wired Briggs under date of Feb. 4, 1930, as follows:

"FEB. 4, 1930

J. S. BRIGGS, ERPI

458 SKINNER BLDG., SEATTLE, WASH.

COLISEUM JUNEAU WIRED US AS FOLLOWS QUOTE WHAT IS THE MATTER WE CANNOT GET REPLACEMENTS ON TWO THREE NINE TUBE WE HAVE FOUR COMING NONE ARRIVED YET AT PRESENT WE HAVE NO SPARE ON THIS TUBE MUST HAVE SPARES WE HAVE A LOOSE CONNECTION IN SYSTEM SOMEWHERES WHEN WILL SERVICE MAN ARRIVE UNQUOTE WIRE THEATRE STATUS IMMEDIATELY AND IF NECESSARY RUSH EXTRA TUBE STOP ADVISE

P. M. WALKER."

(Pr. R. P. 914).

Upon receipt of this wire, Briggs wired Smith, who was now in Cordova, Alaska installing equipment, as follows:

"FEB. 4, 1930.

SEATTLE WASH.

E. V. SMITH, ERPI ENGR.

EMPRESS THEATRE

CORDOVA ALASKA

COLISEUM THEATRE JUNEAU ADVISE HAVE LOOSE CONNECTION IN SYSTEM STOP ALSO THEY HAVE ORDERED FOUR TWO THIRTY NINE AYE TUBES STOP ESS DEE ORDER HAS NOT BEEN RECEIVED BUT WE ARE FORWARDING FOUR TUBES ON BOAT LEAVING FIFTH STOP MAKE SURE WE RECEIVE ESS DEE ORDER STOP ACCORDING TO LOS ANGELES YOU WILL SERVICE ALL ALASKAN HOUSES FROM NOW ON

J. S. BRIGGS. "

NIGHT LETTER.

(Pr. R. P. 915).

Whereupon Smith wired Briggs as follows:

"CORDOVA ALS FEB 5, 1930

J. S. BRIGGS

ERPI FOUR FIFTY EIGHT SKINNER BLDG., SEATTLE

RETEL WILL BE IMPOSSIBLE TO SERVICE JUNEAU OR KETCHIKAN UNTIL INSTALLATIONS ARE COMPLETED AT ANCHORAGE AND FAIRBANKS WHICH WILL BE AT LEAST SIX WEEKS YET REGARDS

E. V. SMITH."

(Pr. R. P. 916).

There upon Briggs wired Juneau theatre as follows:

"SEATTLE WASH.
FEB. 5, 1930.

COLISEUM THEATRE
JUNEAU ALASKA
TUBES SHIPPED TODAY ENGINEER ARRIVES TWELFTH ADVISE NATURE LOOSE CONNECTION

J. S. BRIGGS
STRAIGHT WIRE"
(Pr. R. P. 917).

A few days later Briggs received a letter from Juneau advising that the equipment had been repaired. Briggs, concluding that no service man was then required, did not send one until February 22. (Ev. Briggs. Pr. Rec. Page 918).

Appellee Gross returned to Juneau on February 10, and on that same day he wrote a letter to Gage, appellant's agent, which reads as follows:

"Feb. 10, 1930.

Mr. Gage
Electrical Research Products Inc.
Seattle, Washington

I arrived in Juneau today and my manager is complaining about the service that you have been giving us up here on your Western Electric system.

I paid you while in Seattle, something like

$2000.00 for back service. I can say that I am awful sorry now that I have done this and also that I signed the contract for service as the men you have sent up here have done more harm than they have done good.

After keeping the machines for several months with my own men taking care of them. They gave us no trouble and perfect service. But after I decided on service and service was given they have been on the bum and in fact are still on the bum.

It seems to me that I have men operating in the booth who seem to know more about your equipment than your so called service men or rather electrical engineers. And still we have no right to look over our equipment. You send a man up here just out of school and who don't know what it is all about.

For the last two months we have had one man up here and he gave about 30 minutes service to the machines and put it on the bum because since that time everything has happened.

To date we have plenty of trouble on our movietone and also your tubes do not hold up to standard. They must be old tubes or damaged ones. I don't know which.

Everything from the first that has had to be fixed on this equipment has been done by my men. And most of the time without any help from your office. There is not one thing that has happened to these machines that we have not had to fix ourselves as your service men were too late or they did not come at all in fact we can name

one thing that your service man, one of them could not fix and my man fixed it.

Also we have been promised and they have been recommended new lenses for the movietone. But to date we have failed to receive them or in fact hear anything about them. And more than two months ago we ordered felt pads and they have just arrived.

I want to discontinue my service as since I paid you $2000, your service has been very unsatisfactory and for a matter of fact before this time. In fact my own men are better able to do this service than what your engineers can. As my men have to fix things when they go wrong right then as the show must go on no matter what happens.

When I saw you on the wharf you had a man coming up here. But it seems that he just looked at a few things and left at once for Lathrop's towns. He spent about enough time to write out a report and that is all. Thirty minutes would be a long time for him here.

I think I am entitled to an adjustment on this $2000.00 and also on the last remittance that was made from Juneau as it is just a waste of time for them to come up here to spend 20 or 30 minutes and then go and then my men have to fix things.

I would like a answer to this letter by return mail as I am not at all satisfied with your service.

Very truly yours,
W. D. GROSS."

WDG-c.
(Pr. Rec. Page 329 et seq.).

Under date of Feb. 17, 1930, Gross wrote another letter to Gage which reads as follows:

"Juneau, Alaska,
Feb. 17, 1930.

Mr. Gage

Electrical Research Products Inc.

Seattle, Wash.

Dear Mr. Gage:

I received a wire from your office to the effect that your engineer would arrive Juneau, on the twelfth of the month to repair our equipment that we were having trouble with. To date your engineer has failed to arrive and according to the boat schedules he will not be able to arrive until about the twenty-fifth. This is twelve days after you notified me that he would be here.

This delay in your man arriving has made it so that I had to have my own man repair your equipment.

My idea Mr. Gage, is that there is no way that we can have service in Alaska that would be satisfactory unless you have a man in each town that you have equipment. As it is now the boats are so far between in the winter time, that it is over fifteen days before we could even get service here. And it always happens that when we need service there is no boat or your man is somewheres else. This winter everything that has happened we have had to fix. In fact not one of your men have fixed a thing that has gone wrong. All they have done is to look over the equipment and let it go at that. I would rather take chances and if my men could not fix things, I would wire you

for a man and would pay his fare, expense and salary to Juneau and back.

The $2000.00 I paid you while I was in Seattle, I am now sorry that I did this. RCA has no service man. All the exhibitors that have one of these equipments have to do is to pay off for the machine.

I do not see why I should have to have a service men and get no service as I can assure you that all the real servicing that has been done has been done by my own men.

You had better notify your New York office as to my intention on this service charge.

Also if you think that you can put a service man in Juneau, and have him service Fairbanks. I can assure you that this cannot be done, as the boats and trains in this country do not run as the trains do outside. It will take sometimes a couple of months to make this trip and sometimes longer than this as you can never tell when a boat is going on the rocks, which they do.

From now on I am going to ignore your service charges unless you have a man in Juneau and one in Ketchikan, and if you do not do this. Then I will call for one from Seattle, when I need one and will pay his fare salary and expenses from Seattle.

I am enclosing a bill. And you may make a copy of same and send it to New York.

I have regretted signing that letter the minute after I signed it as your service here in my

theatre has been most unsatisfactory, in fact I have received no service when I really needed it. No court will uphold this agreement when the service has been as it has in the past.

My manager notified you on Feb. 3, 1930, that one of the machines were in need of service. Here it is the 18th and no man has arrived yet. This is not service I can assure you.

I am awaiting a reply to this letter before I take this matter further as I am very dissatisfied the way things are and have been going in regards to service.

Very truly yours,
(Signed) W. D. GROSS."

WDG-c.
(Pr. Rec. P. 332 et seq.).

Under date of March 28, 1930, appellee wrote appellant as follows:

"Seattle, Washington
March 28, 1930.

Mr. R. H. Pearsall,
Electrical Research Products,
San Francisco, California.

Gentlemen:

Your wire of March 14th was relayed to Seattle, as you know I have been traveling for several weeks through small towns.

Will state that the service charge, as it now stands, is out for Alaska. Unless we have a man right in the town where the machines are, it is absolutely no use to make any attempt to pay service charges for Western Electric Equipment.

My men wired you at one time that their machine had broken down and to send a repair man. You answered, stating that a man would be sent on the first boat leaving Seattle, but he did not show up for several weeks, and we were without service during that time. We had to run one machine as the first one was out of "whack" and I cannot see where your service is of any use to us or where it does us any good.

My first agreement with the company was to pay for service charges as I needed them, and for any service needed, I was to pay a man a salary and for his ticket up and down.

A man stationed in Juneau could take care of Juneau and Ketchikan. That would be quite a chance as the boats do not run very often, about once a week or every ten days. In case the machine in Ketchikan broke down, we would have to wait a week or ten days for a man to come from Juneau, but that would be more help than the present line up for service.

You just received $2,000.00 for service for two men to come up and then go right out again on the next boat.

Hoping you can see that I am trying to get away from the present service, and if this thing doesn't come to settlement, I will have to make a settlement on this service charge, which would be the best way to handle it.

You could write me at Seattle, c-o Atwood Hotel. I am going to take this matter up with Mr. Gage, your representative. I wrote him a letter, telling him all about the situation, and I don't

know whether he referred the letter to you or not.

Yours very truly,
(Signed) W. D. Gross.

WDG:h"
(Pr. Rec. Page 336. et seq.).

Under date of June 11, 1930, appellant wrote appellee as follows:

ELECTRICAL RESEARCH PRODUCTS, INC.
Subsidiary of
WESTERN ELECTRIC COMPANY
Incorporated
New York City, N. Y.
Western Division Headquarters,
7046 Hollywood Boulevard
Los Angeles, California,

June 11, 1930.

Mr. W. D. Gross,
Ketchikan, Alaska.

Dear Mr. Gross:

We have for some time considered arrangements for servicing your theatres at Juneau and Ketchikan, that might better assure you of uninterrupted performances.

We realize that under the present arrangements a serious breakdown in the equipment might mean the loss of several consecutive shows before our engineer could arrive at the scene.

As a means of overcoming this hazard, we are contemplating the employment of a man in each of the towns in Alaska where our equipment

is located, to render emergency service. We plan to secure men with the proper technical background, train them in the maintenance of the sound installation, and furnish them with tools, technical data and other equipment necessary to insure their ability to keep the installation operating properly.

In addition to this service, we intend to send a Technical Inspector to Alaska at intervals of approximately six months with the dual purpose of thoroughly overhauling the sound equipment and to instruct the local service men in the latest developments in sound reproduction. The proposed arrangements would in no way effect the weekly service charge that you are now paying. Any additional expense involved will be absorbed by this Company.

As we would like very much to see these arrangements in effect before the end of the summer, we shall appreciate your early acknowledgement of agreement to the proposals set forth in the foregoing. With best wishes for continued success, I am,

Very truly yours,

(Signed) N. A. ROBINSON
Service and Technical Inspection
Superintendent."

NAR: ID

(Pr. Rec. Page 338 et seq.).

"Appellant never placed a man in Juneau or Ketchikan as indicated in that letter, nor did anything indicated in that letter, nor took any steps toward it." (Ev. Gross Pr. Rec. Page 339).

All appellant claims to have done was to send a service-man to Alaska about once a month. With the exception of one man who came to Juneau to install equipment in an opposition theatre, which kept him there for several days, all these men stopped at Juneau and Ketchikan only while the steamer was in port enroute to Western and Interior Alaska. All this appears from the testimony of the various service-men and reports which were received in evidence as exhibits. (See also Louis Lemieux; Pr. Rec. Page 802.) Referring to the service-men and their stay in Juneau, the witness Ned Lemieux says: "I don't remember any of the service-men by name; they weren't around here long enough for me to get that familiar with them." (Pr. Rec. Page 823).

In Sept. 1930, appellant sent a service-man named Lawrence, to Alaska. He remained in Alaska all the time, but not in Juneau or Ketchikan. He inspected theatres not only in Southeastern but also in Western and Interior Alaska. He started from Juneau and went direct to Fairbanks. In doing this he crossed the Gulf of Alaska and other intervening waters to Seward, the terminus of the Alaska Railroad. This meant a sea voyage of about three days. Then he took the Alaska Railroad to Fairbanks, which took two days. There was only one train a week from Seward to Fairbanks—in summer during the tourist season there was a gas train as far as McKinley Park from where a freight train could be taken to Fairbanks. He was

obliged to remain in Fairbanks a week, because the train did not go back for a week. From Fairbanks he went to Anchorage, where he was obliged to remain a week waiting for the next train. Then he went to Seward by rail in five hours if the railroad was in repair. The railroad is in good repair except, to use the language of the witness, "barring a few cases where the engine slips off the track or something it is always in good shape." From Seward he went to Cordova, which took him about a day. Here he remained a week, waiting for a boat. From Cordova, he went to Ketchikan, touching at Juneau. It took a fast steamer about 32 hours to Juneau, and about another day to Ketchikan. Then from Ketchikan he would return to Juneau to start over again. (Ev. Lawrence, Pr. Rec. Page 263 et seq.). These periodical trips were made by Lawrence from month to month just as described, as nearly as the schedule of the boats and trains would permit. (Ev. Lawrence Pr. Rec. Page 289).

This witness testified that he was a service engineer under witness Briggs, who had charge of appellant's service at Seattle. Referring to the character of service furnished at Seattle he says: "The operator there had your telephone number. When the trouble occurred, all they had to do was to telephone you." (Ev. Lawrence, Pr. Rec. Page 262).

And upon the same subject, he testifies on page 262 of the Record, as follows: "The theatre had my

telephone number so if they had trouble I could go fix it; I was always on call." (Pr. R. P. 262).

On page 261 of the printed Record this same witness testifies: "The various component parts of the talkie equipment, if not handled carefully, are apt to get out of adjustment. A number of these parts are liable to get out of adjustment or repair at any moment."

On page 220 et seq. of the printed Record, the witness Lawrence tells what an inspection of equipment consists of; and on page 261 of the Record he says: "I didn't ever make an inspection of the equipment, either in defendant's Juneau or Ketchikan theatres of such scope as embraced in the entire inspection examination that I described."

And in enumerating the various things that require inspection, he says on page 251 of the Record: "and the ground is periodically checked to determine whether it is tight and making good contact, and whether sufficient non-oxide grease is present to overcome corrosion, as defects in the ground would introduce hums, popping or frying noises and a defective ground might cause entire loss of sound." And on page 286 of the Record this same witness testifies: "I don't know where the ground in the defendant's Juneau theatre is located."

During the time that the equipment was in the thea-

tres there were occasional breakdowns both at Juneau and at Ketchikan, but no service-man in the employ of appellant was ever present at either place when a breakdown occurred, nor did any service-man of appellants ever do anything in the way of repairing the equipment. (Ev. Tuckett, Pr. Rec. Page 675; also Ev. Ned Lemieux, (Pr. R. Page 823 et seq.) ; also Ev. Louis Lemieux (Pr. Rec. P. 804 et seq). Approximately once a month, they made an inspection of the equipment that did not differ from the inspection the employees of Gross made every day. And because they came during the day, before the regular daily inspection had been made, they made such minor adjustments as the employees of Gross made from day to day. Upon these matters the witness Tuckett testifies: "I inspected the machinery every night, made minor adjustments generally, same as the engineer does, checked the line voltage, back stage to the horns, each tube and different panels, exciter lights after the machine warmed up, the sound too if both horns were on while the machine was running; once a week go over the machines thoroughly to see they were oiled; every night two or three times during the show, checked the sound to see if it had the right fader setting; whether good, bad or any trouble; pretty near every night we readjusted the photo electric cell; if a tube was weak, we put in a tube from the spare parts cabinet; on weekly inspections saw they had plenty of oil, machines cleaned up, no dirt in the lense; whether exciter light wasn't

too dark or was performing as it should, seeing machine was all cleaned; every week we would go over the whole machine and, where there was any grease, wash it off with tetrachloride and any other dirt, clean it off; the service-man who came up here and made inspections did nothing more than I did every day and every week; they sometimes made the same adjustments I made, because I never made adjustments until an hour or so before the show started at night; we would run it four or five hours the night and after the show you don't want to make adjustments, so we left it until the next day; the engineer usually came in the day time, morning or afternoon, consequently any adjustments necessary were caused through the last night's run; no engineer ever repaired the equipment, or was ever present when there was real trouble or anything wrong; we had breakdowns or difficulties with the equipment." (Ev. Tuckett, Pr. Rec. P. 674 et seq.) (See also Ev. Louis Lemieux, Pr. Rec. P. 803 et seq.); also (Ev. Ned Lemieux, Pr. Rec. P. 826 et seq.).

The only service-man who ever did anything to the equipment, other than to make such minor adjustments as were made by Gross's men from day to day, came in the spring of 1930. He didn't make any repairs, but he did something. He shortened up a wire that should have been left as it was, and then failed to solder the ends together properly. One night after he had left and when there was no service-man in sight,

"a noise came into the horn that was so bad that you couldn't hear the talking at all." Fortunately, Ned Lemieux, who was working for Gross, was able to locate the trouble. He got a new wire and re-soldered it, and the show went on. (Ev. Ned Lemieux, Pr. Rec. Page 825-826).

Appellant's service-men did not make these occassional visits for the sole purpose of inspecting the equipment, "they came to inspect the equipment and to sell merchandise." (See Ev. Gross, Pr. Rec. P. 376).

On Page 288 of the Record appellant's serviceman Lawrence put it this way: "I made those inspections with the view of preventing breakdowns; my work amounted to more than that, though; periodically we received engineering information from our Engineering Department of new discoveries and improvements and we put those into effect in the equipments in the theatres we were servicing, having a regular service of information of that sort forwarded to us and it was our duty to see that those new devices were installed in those theatres if we could sell the defendant on the idea."

There was never a lack of diligence on the part of appellant when it came to collecting service charges. The methods employed by Gage in collecting the first $1,976.60 in Dec. 1929, were continued throughout. The threats then made by Gage were such that they

continued to hang over Gross. On Page 928 of the Record, Gage testifies: "We discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payment of the weekly service charges." And on page 929 of the Record, he says: "We also discussed the fact that if he wished to continue the use of the equipment, it would be necessary for him to continue his payments as he had agreed, including the payment of weekly service charges."

After the supplementary contracts had been signed in Dec. 1929, appellant not only sent weekly statements, but as early as Jan. 1930, it commenced wiring for service charges. On Feb. 3, 1930 Tuckett wired that the money had been sent. The amount of service charges paid at that time was $119.00 for each house, or $238.00 in all. (See Ev. Tuckett, Pr. Rec. Page 687 et seq.). This was the period during which the Juneau theatre had one breakdown, and one short circuit, the repairs in both instances being made by employees of Gross, there being no service man available. During this period, Smith, who was on his way to Western Alaska, came up town while the ship was in port and discharged whatever duty appellant owed in the way of rendering service, by inquiring for a bootlegger.

A few days later Gross returned to Juneau, and

wrote the letters previously set forth at length in this statement, indicating that he would pay no more service charges. None were paid until the following April. On March 14, appellant wired it could not permit continued use of equipment unless service charges were paid. (Printed Rec. Page 452). During April, Gross was in Seattle, and Gage phoned for him. When he got there, Gage told him among other things, "When a chicken don't lay eggs, you know what happens to her, they cut her head off and that is what we are going to do to you if you don't pay up." (Ev. Gross, Pr. Rec. P. 325). Gross then paid an additional $476.00 for service charges. (Ev. Pearsall, Pr. Rec. P. 301).

Thereafter, as before, the bills for weekly service charges were supplemented by a flood of telegrams demanding payment. The Record is full of such telegrams.

One of these telegrams, dated May 28, 1930, contains the statement the appellant cannot permit continued use of equipment unless service charges are paid. (Pr. Rec. P. 456).

On June 6th, appellant wired that unless account were paid it would be forced to refer it to the legal department. (Pr. Rec. P. 456).

On Sept. 22, 1930, appellant again wired that unless payment made in full by October 3rd., account

would be referred to legal department. (Pr. Rec. P. 459).

On October 23rd, 1930, appellant's attorney wrote as follows:

MOTT, VALLEE, AND GRANT
Suite 1215 Citizens' National Bank Bldg.,
Los Angeles
Cal.

October 23, 1930.

Mr. W. D. Gross,

c-o Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Our client, Electrical Research Products, Inc., has placed in our hands for immediate action the matter of your delinquency under license agreement of March 28, 1929, covering the Western Electric sound equipment installed in your theatres.

The delinquency against your Coliseum Theatre at Juneau, amounts to $797.94, and that of the Coliseum Theatre at Ketchikan to $840.00 or a total of $1638.58, as of September 27, 1930.

It is imperative that this delinquency be taken care of at once, or some suitable arrangement for its payment made with us; otherwise, we are instructed to take immediate steps to disconnect your equipment and collect the indebtedness.

Kindly communicate with us at once.

Yours very truly,

(Signed) K. E. GRANT,

for

MOTT, VALLEE & GRANT.

KEG:H

(Pencil notation:—Soon as Mr. Gross arrives we will forward a check to the company 500.00 the full amount will be remitted as soon as we can take care of it as biz. bad.)"

(Printed Rec. Page 691 et seq.).

Upon receipt of this letter, Gross and Tuckett talked things over. Unless something was done, the equipment would be disconnected. They concluded to stall off the appellant until Gross could go to the States and see the appellant's officers and make some kind of a settlement with relation to those service charges. In order to save the equipment, they sent a check for $500.00 ($476.00 of this later credited to service charges) and wrote a letter complaining of bad business—all just to stall the appellant off until Gross could get away. (Printed Rec. P. 693 et seq.).

This was in the fall of 1930; and in the early spring of 1931, before Gross could arrange his affairs so as to get away from Alaska, the account was sent to Attorney Robertson of Juneau for collection. Manager Tuckett tried to stall off Robertson so as to enable Gross to get to the States and make an attempt to

get some kind of a settlement. (See Ev. Tuckett Printed Rec. P. 695.)

Robertson, however, took the position that the account was due and insisted on payment. He brought an action to recover the service charges and attached the box offices at Juneau and Ketchikan. Thereupon, Gross put up a bond to release the attachment. (See Ev. Tuckett, Pr. Rec. P. 695; also Ev. Gross, Pr. Rec. P. 348).

Thereupon Gross received a letter from Attorney Robertson, which reads as follows: "Exhibit F-10.

March 26, 1931.

R. E. Robertson,
Attorney at Law,
200 Seward Bldg.,
Juneau, Alaska.

Mr. W. D. Gross,
Juneau, Alaska.

Dear Sir:

On account of your failure to comply with the terms of that certain written contract entered into on March 28, 1929, between you and the Electrical Research Products, Inc., and subsequently mutually modified on or about September 4, 1929, in respect to that company's granting you a non-exclusive, non-assignable license to use in your theatre at Juneau Alaska, certain equipment more particularly designated as "Type 2-S equipment designed for use with two simplex projectors for

film and disc reproduction for the electrical reprouction of sound in synchronization with, or as incidental to, the exhibition of motion pictures, or any performance given in conjunction therewith, and of your failure to perform the terms of a similar agreement, similarly modified, covering similar equipment in your theatre in Ketchikan, Alaska, and in view of your default in performing the terms of these agreements both in respect to your Juneau and Ketchikan theatres, on behalf of the Electrical Research Products, Inc., I hereby make demand upon you for the immediate return to it of the aforesaid equipment at each of said theatres.

Unless you notify me on or before Tuesday, March 31, 1931, that you will immediately return the above described equipment which is now in each of your Coliseum Theatres in Juneau and Ketchikan, action will be promptly instituted against you by the Electrical Research Products, Inc., to recover from you the possession of this equipment now in your Juneau theatre and of this equipment now in your Ketchikan theatre, together with damages for the detention thereof.

Yours very truly,

(Signed) R. E. ROBERTSON."

RER:H.

(Pr. Rec. P. 349).

Referring to the events that took place immediately following the receipt of this letter, the witness Gross testifies: "After receiving that letter I saw Robertson and told him that the bond was put up, why didn't they wait and see if the Court says I have

to pay service charges or not; he claims he is the Court and will take this into his own hands and he said if I don't pay the money right off he would tear the machines out; that is all the conversation I know; I went to my office and talked to my manager and he told me he would go to see Robertson and see what he could do, and he came back and he advised me to take the first boat and go outside and buy other machines; the boat was in port, I took the boat, left for Seattle, wired Universal High Power to have two machines ready, one for Juneau and one for Ketchikan." (Pr. Rec. P. 350-351). The witness further testifies that he procured these new machines to prevent a shut-down, and that in case the equipment then in his theatres was replevined he would have to close his theatres. (Pr. Rec. P. 351. See also Ev. Tuckett, Pr. Rec. P. 695 et seq.).

The total cost of the new equipment purchased in Seattle at this time, including additional parts, was $5,257.84. (Pr. Rec. P. 699).

While Gross was gone to Seattle, Tuckett managed to stall off proceedings; but immediately upon the return of Gross this replevin action was brought. Pr. Rec. P. 697).

When the writ of replevin was served appellee asked for time to put up a bond in an equivalent amount; but counsel for appellant refused to grant it and di-

rected the marshal to take the equipment out. (Ev. Tuckett, Pr. Rec. P. 697).

The equipment was then taken out, and Lawrence, an engineer in the employ of appellant, immediately took the equipment apart so that appellee could not put it together again. This made the equipment entirely useless, so far as appellee was concerned. (Ev. Tuckett; Pr. Rec. P. 697 et seq.; also Ev. Gross Pr. Rec. P. 358-359).

Lawrence also disconnected the Ketchikan equipment, immediately upon the service of the writ, so that it could not be reassembled by appellees. (Pr. Rec. P. 834).

The new equipment brought up from Seattle by Gross was then immediately installed in both theatres. (Pr. Rec. P. 360; 834).

The new equipment proved to be inferior to the old. The sound was bad. Everything was done to improve it, but to no avail. However, this equipment was the best and only equipment to be had at that time. (Ev. Gross, Pr. Rec. P. 360-361).

This immediately resulted in a loss of business, and consequent profits. (Pr. Rec. P. 361-362). In Ketchikan the results were the same, for the same reasons. (Pr. Rec. P. 363).

Both theatres were operated by appellee for a per-

iod of something less than two years after the equipment was removed by appellant. During this period the Juneau theatre lost $32,165.96 in profits and the Ketchikan theatre lost $50,326.06 in profits. (Pr. Rec. P. 556; 560). Thereafter both theatres were leased to one Shearer, who soon afterwards re-installed appellant's equipment. (Pr. Rec. P. 556; 560).

It will be necessary to review the evidence relating to the loss of profits in connection with a discussion of that subject. In order to avoid repetition, it will not be referred to in the statement of facts except to say that it shows, among other things, that appellee's theatres were always profitable until the equipment was removed under the writ of replevin, and what these profits were from month to month during the two years next preceding the removal of the equipment. It also shows the losses from month to month after the equipment had been removed. In addition to this it shows the pick-up after appellant's equipment had been re-installed by Shearer. In the case of the Ketchikan theatre, profits were immediately restored; in the case of the Juneau theatre, losses were immediately reduced, but as Shearer used it as an overflow and second class theatre in connection with the operation of another theatre, it cannot serve as an index. (Ev. Gross, Pr. Rec. P. 471).

When Shearer took the equipment which Gross had brought up from Seattle out of the theatres, it had

no value for junk or otherwise. (Pr. Rec. P. 366).

The rental value of the equipment taken out for the unexpired term of the lease or license was admitted in the Complaint to be $1,050.00 per year for each theatre, (Pr. Rec. P. 14, 15, 8) or $2,100.00 per year for the two theatres. (See Complaint; Pr. Rec. P. 14, 15, 8).

The Complaint sets up the original contracts, Exhibits Nos. 1 and 3, and also the supplemental contracts Exhibits Nos. 2 and 4. It is claimed that unpaid service charges were due in accordance with the rate fixed in the supplemental contracts Exhibits 2 and 4. The answer admits the execution of the original contracts Exhibits Nos. 1 and 3; but it denies that the supplemental contracts Exhibits Nos. 2 and 4 are the contracts of the parties, and denies that they were executed by appellant, and avers that they are without consideration and that the signatures of Gross thereto was obtained by duress. The answer also contains several Counter-Claims. These Counter-Claims set up the execution of the original contract, compliance with its terms by appellee, and the removal of the equipment under the writ of replevin. Damages were claimed for the rental value of the equipment removed, the loss of profits resulting from the removal, and for the monies expended for new equipment, installed to reduce damages. Counter-Claims also relat-

ing to the payment of monies under duress, and monies so paid were sought to be recovered.

The Jury returned the following verdict:

IN THE DISTRICT COURT FOR THE TERRITORY OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU.

ELECTRICAL RESEARCH PRODUCTS, Inc., a corporation,	)	
Plaintiff	)	No. 3167-A
vs.	)	
W. D. GROSS,	)	
Defendant.	)	

We, the Jury, empaneled and sworn in the above entitled cause, find for the defendant generally and against the plaintiff upon the issues presented by the First Cause of Action stated in the Complaint.

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant, generally and against the plaintiff, upon the issues presented by the Second Cause of Action stated in the Complaint.

We, the Jury, empaneled in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the

First Counter-Claim pleaded in the Answer against the First Cause of Action set up in the plaintiff's Complaint; and in this connection we assess the defendant's damages as follows:

(1)	The rental value of the equipment taken from the "Coliseum" theatre at Juneau, under a writ of replevin in this action	$9,000.00
(2)	Damages resulting from the loss of profits to the defendant by reason of the removal of the of the equipment from the "Coliseum" theatre at Juneau....	$19,440.00
(3)	Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Juneau	$ 2,628.92

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the Second Counter-Claim to the First Cause of Action, and fix the amount of the recovery on said Counter-Claim at $1,725.77.

We, the Jury, empaneled and sworn in the above entitled cause, further find for the defendant generally and against the plaintiff upon the issues presented by the Third Counter-Claim, the same being the First

Counter-Claim to the Second Cause of Action, and assess the defendant's damages as follows:

(1) The rental value of the equipment taken from the "Coliseum" theatre at Ketchikan, under a writ of replevin in this action ..... $ 9,000.00

(2) Damages resulting from the loss of profits to the defendant by reason of the removal of the equipment from the "Coliseum" theatre at Ketchikan $12,320.00

(3) Damages resulting to the defendant because of monies expended to reduce damages resulting from the removal of the equipment from the "Coliseum" theatre at Ketchikan ..... $ 2,628.92

We, the jury, further find for the defendant generally and against the plaintiff upon the issues presented by the Fourth Counter-Claim, the same being the second Counter-Claim to the Second Cause of Action, and fix the amount of recovery on the said Counter-Claim at $1,692.72.

JOSEPH SIMPSON,
(Foreman)

(See Printed Rec. Page 124).

After the foregoing Statement of Facts had been printed, we were served with appellant's Brief, which also contains a Statement of Facts. There are a number of statements in this Statement of Facts of appel-

lants which are erroneous. This is especially true of that portion of the Statement entitled, "Undisputed Facts." In view of the fact, however, that these matters are fully discussed in connection with the discussion of the various Assignments of Error, where the erroneous statements of appellant are pointed out, we will not go into the matter at this point except, to say that we do not concur with the Statement of Facts presented by the appellant in a number of particulars.

ARGUMENT

The various errors assigned will be discussed in the order in which they appear in the assignment of errors.

FIRST ERROR ASSIGNED

CONSTRUCTION OF CONTRACT.

The first error assigned relates to an instruction given by the Court in connection with the construction of the original contracts. The instruction complained of is as follows: "And in this connection, I instruct you that the said agreements (of March 28, 1929) or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment services."

The specific objection to this instruction, as stated by counsel for appellant, is that, "the omission of the

amount in paragraph 6 does not make the service free." (Pr. Rec. Page 129).

The exception as stated does not call the court's attention to any specific error of law; it does not point out any part of the contract referred to under which the contract required the defendant Gross to pay plaintiff for periodical inspection and minor adjustment service. In other words, it does not call the court's attention to the respect in which the court erred, or why the court erred. All the objection amounts to is that the omission of the amount, in paragraph 6, does not make the service free—that is to say, it is claimed that the omission of the amount in a particular place does not make the service free, but it is not pointed out where in the contract there is a provision that periodical inspection and minor adjustment service must be paid for. The exception taken would in no way aid the court in reaching the correct conclusion if there were anything wrong with the conclusion that the court had reached; for that reason, as we will point out from the authorities to be hereinafter discussed, the exception brings up nothing for review or re-consideration by this Court.

But the Court did not instruct the jury that the service was free. The Court merely instructs that the contract does not require payment for "inspection and minor adjustment service"; "service," as that term is employed in paragraph 6, is not referred to.

There is a wide difference in meaning between the term "service" as employed in paragraph 6, and the phrase "inspection and minor adjustments," as used in paragraph four and paragraph eight. But, first let us inquire into the effect of paragraph 6. The contract is upon a printed form, embodying many severable provisions, generally stated in separate paragraphs, separately numbered. The blanks in the other paragraphs were filled in, so as to make them effective; but the blanks in paragraph 6 were all left blank. The paragraph as it occurs in the contracts, reads as follows: "In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be $..... per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of $..... per week."

Now the question is, what is the effect of this paragraph which the parties left incomplete by a failure to fill in the blanks. The contracts contain no authority to fill in the blanks—in fact, they contain no reference to paragraph 6 at all, although two typewritten provisions, relating to other matters, are added to the printed form. Nor is there any room for implied authority or separate understanding with relation to these blanks, for paragraph 20 expressly provides: "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates." (Pr. Rec. Page 186).

It was the obvious purpose of the parties to leave paragraph 6 incomplete and ineffective—leave it out of the contracts entirely, as though it had never been there. And this is in accord with the verbal testimony of the parties upon the subject. Appellant's witness Anderson, by whom the contracts were executed, on behalf of appellant, testifies as follows: "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the

probable cost of furnishing engineering service for the theatres in that territory."

Thereupon witness further testifies, over defendant's objection: "it was consequently unwilling to enter into a contract which would fix the amount of its compensation for the rendering of such service when the cost of rendering it was still an unknown quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank." (See Pr. Rec. Page 169-170.) A portion of this evidence was probably incompetent, in view of the provisions of the written agreement, and it was admitted over appellee's objection; but the important thing about the evidence is that it shows an unwillingness on the part of appellant to make paragraph 6 complete or effective at the time the contract was executed. Then too, Gage, appellant's agent, told appellee that the contracts had been executed with the service clause left out and that he would have to provide his own service man. (Ev. Gross, Pr. Rec. Page 117-118; Ev. Cawthorn, Pr. Rec. Page 476); Gross made provision to service his own equipment. (Pr. Rec. Page 318); Wilcox, appellant's Vice-President, said, "Gross has no service with us." (Ev. Gross Pr. Rec. Page 319; Ev. Lemieux, Pr. Rec. Page

802); no attempt was made by appellant to collect service charges until it attempted to secure a supplemental agreement providing for them. (Ev. Gross, Printed Rec. Pages 319-320); and, finally, appellant sought to bring about the execution of a subsequent agreement with a view of making paragraph 6 effective. It may be added that it was upon the supplemental agreement that appellant relied to recover service charges in this action. Obviously, it did not consider itself entitled to service charges under the original agreement at the time this action was brought. All this goes to show that all were agreed that paragraph 6 of the original contracts was and is of no effect.

But we are not compelled to rely upon the understanding of the parties, for the Courts have uniformly held that printed forms with the blanks left blank are ineffective, because incomplete, in so far as the provisions in which the blanks occur are concerned.

The exact point was before the Court in the case of Church vs. Nobel, 24 Ill. 292. It was an action on a lease contract.

According to the opinion, the defendant had agreed to do certain things under certain conditions, and "in addition thereto to pay the plaintiff the sum of $....." In affirming a judgment denying relief, it was said: "The party of the first part did not contract

to pay anything in addition, for blank dollars are no dollars. We cannot make contracts for parties; we can only interpret them to enforce them. We interpret this to mean that $..... dollars are the measure of damages agreed upon by these parties; and they are no dollars, and therefore nothing was to be paid."

The case of Rhyne vs. Rhyne, 66 S.E. 348, was an action on a bond containing a blank which had not been filled in. A judgment granting relief was affirmed because the amount could be ascertained from other parts of the contract; but the Court took the precaution of adding: "We recognize the general rule that if a blank be left in an instrument, the omission may be supplied only if the instrument contains the means of supplying it with certainty."

In the case of Lore vs. Smith, 133 So. Page 214, the Supreme Court of Mississippi was called upon to decide what effect was to be given to a clause in a deed of trust, upon a printed form, containing blanks that had not been filled in. In denying relief, it is said:

> "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause should not become operative, unless an agreement can be implied therefrom that the grantee or cestui que trust should fill the blanks in accordance with the intention of the parties. We are not called upon to decide whether such an implication here arises;

for the grantee or cestui que trust did not attempt to assert such a right, but recorded the deed of trust without filling the blanks. 'A writing is incomplete as an agreement where blanks as to essential matters are left in it, unless they can be supplied from other parts of the writing itself.' 13 C. J. P. 308, or unless and until such blanks are lawfully filled."

This case is on all fours with the case at bar.

In the light of what has been said, if, as counsel assumes, the instruction relates to service as that term is used in paragraph 6, the instruction is correct, for paragraph 6 was left incomplete and inoperative. However, the instruction is correct for still another reason. It deals with "inspection and minor adjustment services," as dealt with in paragraphs 4, and 8 of the contract. It is expressly provided that such services are not to be paid for.

The making of periodical inspections and minor adjustments is one thing; the rendition of service under paragraph 6 is quite another thing. In one case, an engineer looks over equipment that is in repair and makes such minor adjustments as may be required; in the other case, he repairs equipment that has been broken down and keeps it in repair. (Ev. Clayton, Pr. Rec. P. 783-784; Ev. Cawthorn, Pr. Rec. P. 472-474). That there is this distinction between the meaning of the phrase "periodical inspection and minor adjustments and the meaning of the term "service" as employed in paragraph 6, when used by those engaged

in the motion picture business, as testified to by appellee's witnesses above listed is a fact that was not denied by any witness upon the trial, not even by Wilcox, and no one was better qualified to speak upon this subject than he; he took the stand and testified concerning many matters, but he did not deny that Clayton and the other witnesses were correct upon this point. In fact Wilcox corroborates the testimony of the others, in this: periodical inspection and minor adjustments may be made periodically, but service must be rendered continuously to have any value at all, for the obvious reason that equipment must be in repair all the time in order to operate. In describing service as rendered by appellant (to everyone except Gross) Vice-President Wilcox says: "plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away." (Pr. Rec. P. 292.) Surely, this is something different from making periodical inspections and minor adjustments.

The contention made by counsel on page 21 of appellant's Brief that the only service which plaintiff agreed to render was the making of periodical inspection and minor adjustments, provided for in paragraph 4, and that therefore the word "service" as used in paragraph 6, must necessarily refer to the making of periodical inspections and minor adjustments, is entirely without force. In the first place, "periodical inspection

and minor adjustments" is a term not synonymous with the term "service." It may be service, but there is no more reason for saying that that is the particular service referred to in paragraph 6, than it is for saying that all the other service rendered by appellant under the contract is also referred to as the service contained in paragraph 6. Under paragraph 4, for instance, appellant agrees to render many kinds of service, and it is far more likely that the term "service" referred to in paragraph 6, refers to these many items of service, than to the "inspection and minor adjustment service," for the reason that there is nothing in the contract to show that these various kinds of service were to be rendered free, while the contract does show in express terms under paragraph 8, as we shall later point out, that the "inspection and minor adjustment service" is not to be paid for—that is to say, there is to be no extra pay for it. Appellee is to pay a rental charge of $1,050.00 for each machine per year, and it was obviously intended that this should cover and pay for these various items. The service referred to in paragraph 6 was simply the customary service rendered by the appellant to everyone that leased equipment from it. This is evident from the testimony of Vice President Wilcox, in which he says:

> "* * * Plaintiff did not under the old system service machines once a week; in the beginning for the first six weeks of operation in 1929 and 1930 we serviced once a week for the first six months; when I say a week it might have been eight days

one time and six another, but approximately every ten days; the second six months and thereafter, approximately every two weeks with the exception of very large de luxe houses, with a seating capacity of upward of 1,500 seats of which there were about 150 in the United States, which were serviced every week; plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away."
(Pr. Rec. P. 292).

The language of the contracts themselves, especially in the light of the evidence bearing upon the meaning of the terms employed, is clear.

INSPECTION AND MINOR ADJUSTMENTS

Paragraph 4 of the original contract provides: "Products also agrees to make periodical inspection and minor adjustments in the equipment after it shall have been installed." (Pr. Rec. P. 175).

Under the provisions of paragraph 4, Products agrees to train operators, keep an engineer in attendance to advise them for a week after installation, and to make periodical inspection and adjustments. All these provisions relate to the furnishing of such expert service as a vendor or lessor often furnishes in connection with the installation of any machine. This being a machine of extreme delicacy, the provisions might be expected to be expressed and inserted in the

contract—ordinarily they would be understood. Products is to train operators, supply an engineer for a week, and after that, it is not to set Gross adrift, but it is to make periodical inspections and make minor adjustments. All these provisions are grouped in one section, and their obvious purpose is to insure the smooth operation of equipment that is in a good state of repair—the matter of keeping the equipment in repair is dealt with under the provisions of paragraph 6.

The periodical inspection and minor adjustment was to be rendered without extra charge according to the express provisions of the contract. Paragraph 8 of the original contract provides: "The exhibitor also agrees upon rendition of invoices to pay for any service rendered and expenses incurred by Products' employees in connection with and for the benefit of the exhibitor, except for the regular periodical inspection and minor adjustment service heretofore provided for." (Pr. Rec. P. 178). The closing words of this paragraph "except for the regular periodical inspection and minor adjustment service heretofore provided for" are not discussed or referred to by appellant's counsel in his brief at all. In his brief, appellant's counsel deals with the contract as though it did not contain this provision at all.

The first portion of this paragraph provides in general terms that the exhibitor agrees to pay for any

service rendered for the benefit of the exhibitor. If nothing more were said the "periodical inspection and minor adjustment service referred to in paragraph 4 would have to be paid for. This would be so because the phrase "any service" is equivalent to all service. It is all inclusive. In order to avoid that construction, it was necessary to add the concluding portion of the sentence, which reads: "except for the regular periodical inspection and minor adjustment service heretofore provided for." Obviously, the purpose was to provide that the periodical inspection and minor adjustment service provided for in paragraph 4, was not to be paid for—that it was something that was to be taken care of by the high rental charge that was to be paid. If that was not the purpose, why was the clause inserted? Upon the trial, counsel for appellant contended that what the concluding clause really refers to is the service to be rendered under paragraph 6. Not, that this service should not be paid for; but that the clause should be construed as though it read: "except for the regular periodical inspection and minor adjustment service *the payment of which is* heretofore provided for." But if the payment of the service to be rendered had already been provided for, why provide that it should not be paid for? If the service was to be paid for anyway, why except it from a provision making a general provision for payment? Why speak of it at all? It would take care of itself. The courts do not presume that parties to a contract use idle and

unnecessary language; and it goes without saying that they will not resort to the interpolation of words in order to convert what is essential, plain and unambiguous into what is unnecessary, uncertain and meaningless.

Paragraph 4 of the original contract provides for the inspection and minor adjustment service, and paragraph 8 provides that Gross need not pay extra for it. It was the duty of the Electric Company under the original contract, to supply this service,, and a failure to do so would constitute a breach of the contract.

But this duty is later converted into a privilege. Under the contract, Products agrees to make inspections. So far the contract imposes a duty upon Products. But the contract also provides that the exhibitor shall permit Products to make inspections. (Par. 12, P. R. P. 179) that Products shall have the right to require the installation of new parts (Par. 4, P. R. P. 176) and that the exhibitor shall purchase them from Products and from no one else, (Par. 2, P. R. P. 173). Thus what was a duty is converted into a privilege—a privilege which makes of every service man a salesman with power to dictate what the buyer shall buy.

To determine what is meant by service, in paragraph 6, we need only turn to plaintiff's Ex. 2, which is paragraph 6 with the blanks filled in. This document does not deal with minor adjustments but with

service. Minor adjustments are required by equipment in repair; service is required by equipment out of repair—to service a machine is to keep it in repair. For this service the exhibitor is to pay a large amount weekly, while, according to paragraph 8 of the contract, he is not to pay extra for the minor adjustment service at all. The service is not to be periodical but continuous. If not continuous it would be valueless; if not continuous the amount charged would be ridiculous. The sum of $29.75 is to be paid weekly in advance. In advance of what? Obviously, in advance of the rendition of the service. If the service were not to be rendered continuously when needed throughout each succeeding week, it could not be paid weekly in advance. The document also provides that Gross is to pay for the use of air-planes and the like in case of emergency service visits. Now, what did the parties have in mind when they wrote this,—minor adjustments or breakdowns? Clearly, the latter. They were dealing with repairs, not with adjustments.

But, we are dealing with the original contracts. The Court instructed the jury that they do not require Gross to pay for "inspection and minor adjustment service." Even if the contracts did not expressly provide that this service is not to be paid for, the instruction would be correct. Nowhere in the contracts is there a provision requiring payment for any kind of service. If so, how much? The purpose of the supplementary contracts was to provide for payment under

paragraph 6. Prior to their execution there was nothing to be paid under that paragraph.

The effect of leaving the blanks in paragraph 6 is discussed from a somewhat different angle on page 65 of this Brief.

ASSIGNMENT NO. 2.

This assignment relates to the following language contained in the instructions:

> "And in this connection, I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts (of September 4, 1929) the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services."

(Printed Rec. Page 129).

The exception taken to this instruction is in the following language:

> "We take an exception to instruction No. 2 * * *. We take an exception to that part of the Court's instructions commencing with line 20 on page 13 (Par. 8) * * *." (Pr. Rec. Page 129-130; Pr. Rec. Page 1024).

It will be noted that the ground of the exception was not stated, so that the exception presents nothing for review, either under Rule 10 of this Court or under the general law upon the subject.

In the case of United States vs. United States Fidelity and S. Co., 236 U. S. 512; 35 Sup. Ct. R. 298-303, Mr. Justice Pitney, speaking for the Supreme Court says :

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court."

The exact point has been passed upon by this court in a number of cases. Thus in the case of Sacramento Suburban Fruit Lands Co. vs. Johnson et. al., 36 Fed. 2nd. 925, it is said:

> "There are five specifications of error based upon exceptions to the instructions given, but these exceptions are insufficient, because in no case was the ground of the exception stated."

In Howard vs. Beck, 56 Fed. 2nd. 35, the effect of Rule 10 and the authorities bearing on this rule are considered and reviewed.

In the case of State Life Ins. Co. vs. Sullivan, 58 Fed. 2nd. 741-744, the exact point was again before this court. In that case it is said:

> "Appellant objects to two paragraphs of the charge given by the court to the jury. These ex-

ceptions do not state the ground of the objection, and are clearly insufficient to justify our consideration. The charge to the jury, according to the bill of exceptions, was frequently interrupted by the expressions "Exception noted, exception No. 16," and so on to and including Exception No. 24. These exceptions are insufficient to raise any proposition of law for the consideration of this court."

But there is nothing wrong with the instruction. The language objected to must be read in connection with what preceeds it and follows it. The whole instruction so far as pertinent reads:

"The defendant also claims that the alleged contracts of September 4th, 1929, have no effect upon the defendant Gross, because they were executed without consideration.

In this connection I instruct you that when a party promises to do what he is already legally bound to do, or does what he is already legally bound to do, neither such promise nor act is a valid consideration for another promise.

And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28th, 1929, it cannot recover for such services; or if you believe from the evidence that the "service" referred to in the alleged contracts of September 4th, 1929, is something different or in addition to the "inspection and minor adjustment service" referred to in the contracts of March 28th, 1929,

the plaintiff cannot recover therefor unless he has performed such service; and in this connection I instruct you further that there is evidence before you upon the question of what is meant by the term "service", when used in connection with the sale and use of motion picture sound equipment when used by those engaged in the business of supplying and dealing in motion picture sound equipment; and that if you find that this term "service" has a meaning when used by persons so engaged, other and different from its ordinary meaning, you must apply that meaning to the term as used in said supplemental contract of September 4th, 1929. The question of what is meant by the term when so used by persons so engaged, is a question of fact for the jury, and if the term when so used means something other and different from the "inspection and minor adjustment service" hereinbefore referred to, then there was and is a consideration for the alleged contracts of September 4th, 1929, and plaintiff would be entitled to recover therefor if it performed such "service", but would not be entitled to recover therefor unless it did perform and furnish such service, provided, of course, you find that the "service" mentioned in the supplemental contracts of September 4th, 1929, was not the same "service" provided for in Paragraph 4 of the contracts of March 28th, 1929." (See Pr. Rec. Page. 994-995.)

That the supplemental contracts of September 4th required a consideration to support them cannot be doubted. In volume six of Ruling Case Law at page 917—Contracts Par. 301—it is said:

"A valid consideration is an essential and indispensable element in every binding agreement.

> If a written contract is altered by agreement, such agreement must have the essential ingredients of a binding contract; and although it may have reference to, and indeed embody, the terms of the written contract, yet it must be founded on a new and distinct consideration of itself."

This is especially true of a contract such as the contracts P. Ex. 1 and 3, which contain no provision relating to their amendement or modification at a later date, but which do contain a provision which negatives the idea that there was any agreement or understanding, either express or implied, upon that subject or any other subject not covered by the express and complete agreement of the parties as expressed in the contract. Paragraph 20 reads in part as follows:

> "20. The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates." (Printed Rec. Page 186).

Since a consideration was necessary, it requires no citation of authorities to show that the Court was right in instructing the jury that "when a man does what he is already legally bound to do, his act is no consideration for a promise."—this is fundamental.

ASSIGNMENT NO. 3.

It is assigned as error that the Court refused to give the following instructions:

> "You are instructed that the plaintiff claims that the amount to be paid for inspection and minor adjustment service was left in blank in paragraph six of each of the contracts of March 28th, 1929, plaintiff's exhibits Nos 1 and 3, because the amount thereof could not be determined at the time that those two contracts were made and that it was understood between plaintiff and defendant that the amount of that weekly charge should be fixed at a later date.
>
> "In this connection I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties. The plaintiff alleges that the amount to be paid for such services was agreed upon between it and the defendant and that it was to be $29.75 per week for each theatre and plaintiff further alleges that this agreement was expressed in the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4."

The exception taken to the refusal to give this instruction, is as follows:

> "The Court refused to give the foregoing instruction, either in words or substance, to which

> refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted." (Pr. Rec. Page 976).

It will be noted that the ground of the exception is not stated. The attention of the trial judge was not called to any specific error to the end that he might correct it. As was pointed out in discussing the previous assignment, such an exception presents nothing for review. The rule that the ground of exception must be stated is as applicable to an exception to the refusal to give an instruction as to any other. It was so held by the Supreme Court of Washington in the case of Mono Service Co. vs. Kurtz, 17 Pac. 2nd., 29-31, where it is said:

> "The exception shown in the record is: "Plaintiff excepted to the refusal of the court to give said instruction, and the exception was by the court allowed."
>
> We have frequently held such an exception to be insufficient under the rules which now govern."

The Washington rule required exceptions to be taken to instruction given or refused, and required the exception to be sufficiently specific to apprise the trial judge of the points of law or questions of fact in dispute." Kowalski vs. Swanson, 34 Pac. 2nd. 454. Our rule 10 is general in its terms and relates generally to the charge, but its requirements do not differ substantially from the Washington rule. An exception

to the refusal to give an instruction is as much an exception to the charge as an exception to the giving of an instruction. In one case it is objected that the charge contains too little; in the other, that the charge contains too much—in either case the objection is to the charge. Moreover, the Washington rule merely states the general law upon the subject. (See also Richmond vs. Whittaker, 255 N. W. 681.)

Nor did the Court err in refusing to give this instruction. The first portion relates to what plaintiff claims. Clearly, the Court is not required to instruct the jury upon the contentions of the parties; although it may do so in so far as it is necessary to define the issue, and that was done by Instructions Nos. 1 and 2. The Court could not instruct that there was an understanding between the parties that the amount of the weekly service charge should be filled in at a later date, not only because there is no evidence that any such arrangements existed but also because Section 20 of the contracts (previously quoted) precludes the existence of any such arrangement. The Court is then asked to charge that even if the amount of weekly charge for inspection and minor adjustments was left blank, that this did not mean that these services should be rendered free. But the amount to be paid for inspection and minor adjustments was not left in blank. Paragraph 8 of the contract, as has already been shown, expressly provides that the inspection and minor adjustment service is not to be paid for at all. What was

left blank was the amount to be paid as weekly service charges for service as used in paragraph 6; and this service, as has already been pointed out, is a very different thing from inspection and minor adjustments. The court is also asked to tell the jury that the amount to be paid for inspection and minor adjustments might be shown to have been agreed upon by other evidence. But paragraph 20 provides that there were no other agreements or understandings, either express or implied. True, there might be a subsequent agreement, but there was no evidence of it. The supplemental agreements of September 4th, do not relate to inspection and minor adjustments but to service. These form the basis of the action, and their validity is questioned on many grounds. Surely, the court was not required in this manner to tell the jury as here requested what plaintiff claimed for them—that whole matter had been covered by instructions Nos. 1 and 2.

Then, also, if the court was right in refusing any part of this proposed instruction, it was right in refusing the whole, for it is not the duty of the court to separate the wheat from the chaff in such cases.

ASSIGNMENT NO. 4.

It is urged that the Court erred in instructing the jury as follows:

> "In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is author-

ized to alter or modify those agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that "Anderson" had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements."

To this instruction appellant took an exception in the following language:

> "We except to that part of the court's instruction No. 3, commencing on line 21, page 15, Par. 4, down to the remainder of that particular instruction 3, on the ground it does not state the true principle of law applicable to written instruments or contracts particularly, and that neither party is bound by the particular provision that only a president or vice-president could change these contracts if they afterward agree to change them otherwise." (Pr. Rec. Page 1025-1026).

Here is an attempt to state the grounds of the exception; but the grounds, as stated, are too indefinite, uncertain, and incomplete—they are not such as to di-

rect the attention of the trial court to any particular misstatement of law in the instruction. It is objected that the instruction "does not state the true principle of law applicable to written instruments;" but there are many legal principles applicable to written instruments, and it is not stated which of these is violated, nor is the court's attention called to the true principle that should govern—so far we have nothing but a general objection. The objection continues, "and that neither party is bound by the particular provision that only a president, or vice-president could change these contracts if they afterwards agree to change them otherwise"; but the instruction does not deal with this matter at all. The court does not instruct that the provision relating to the authority of agents in any wise limit the parties themselves. The instruction deals solely with the authority that third parties—agents and representatives—can exercise on behalf of the parties under the provisions of the contract and with the manner in which this authority must be exercised. No part of the objection, therefor, calls the court's attention to any mis-statement in the instruction.

In the case of Allison vs. Standard Air Lines, 65 Fed. 2nd. 668, where this court had before it an exception that was uncertain in its terms, it is said:

> "These purported exceptions are not clear. They fall far short of that degree of succinctness and particularity that the courts have exacted of exceptions to instructions, on the ground that the

lower court should be given a fair chance to correct any alleged errors in its instructions before the case is submitted to the jury.

We have studied these two purported exceptions very carefully, and we are convinced that they are fatally ambiguous, equivocal, and indefinite. Nowhere is there a specific statement of the error alleged to have been committed by the court."

In the case of Davis vs. North Coast Tranps. Co. 295 Pac. 921, the Supreme Court of Washington had before it an exception reading as follows:

"Defendants except to instruction number three for the reason that the same is not a statement of the law applicable to the case and not justified or warranted by the facts."

It will be noted that this exception was in some respects at least like the exception now being considered. In passing upon the sufficiency of the exception, it is said:

(4) This exception in no way called the court's attention to the fact that in the instruction there was an incorrect statement of the law in that it was said that contributory negligence, in order to defeat a recovery, must have been the proximate cause of the injury. In Kelly v. Cohen, 152 Wash. 1, 277 P. 74, 75, it was held that an exception to an instruction in this language, "Defendant excepts to instruction No. 5, upon the ground and for the reason the same is not a correct statement of the law, and not based upon the evidence in this case," was too general and was not a compliance

with the rule requiring instructions to be sufficiently specific to apprise the judge of the points of law or questions of fact in dispute.

In a later case, Parton v. Barr, 24 Pac. 2nd. 1070, this language is employed by the Supreme Court of Washington:

> "Nor are we permitted to consider the question raised with reference to instruction No. 16-A, because, while exceptions to it were taken in time, that is, after the jury retired and before reception of the verdict, nevertheless the exceptions were not "sufficiently specific to apprise the judge of the points of law or questions of fact in dispute." Rule of Practice 6, 159 Wash. p. lxi; Rem. Rev. Stat. 308-6. The exceptions to the instruction were "that it is not a correct statement of law, and that the instruction is confusing to the jury." Such exceptions are fatally defective."

Nor did the court err in giving this instruction. In order to understand it, it must be read in the light of what precedes it. It is preceded by the following:

> "The plaintiff claims that the original contracts of March 28th, 1929, were mutually modified by the execution of two new supplemental agreements under date of September 4th, 1929.
>
> It is then alleged that the defendant agreed by these alleged supplemental agreements to pay a weekly service charge of $29.75 under each contract. In opposition to this claim the defendant maintains in the first place, that these alleged contracts of September 4th, 1929, were not executed by the parties at all, in that they were not

signed by the plaintiff corporation, and in that the name of the plaintiff corporation does not occur in the body of the instruments.

In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as "Comptroller" without further describing himself, and that the question of whether said "Anderson" was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions." (Pr. Rec. Page 996).

The first portion of the language excepted to is a mere statement, word for word, of the language of the original contracts. These contracts provide:

"No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the President or a Vice-president of Products or by such representative as may from time to time be designated in writing by either of such officers." (Pr. Rec. Page 186).

The alleged contracts referred to in the instruction are upon the printed letter-head of appellant and are as follows:

"PLAINTIFF'S EXHIBIT NO 2.

ELECTRICAL RESEARCH PRODUCTS, INC.
Acoustic Department
250 West 57th Street
New York, N. Y.
Subsidiary of
WESTERN ELECTRIC COMPANY
Incorporated

September 4, 1929.

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska as from time to time established. Under Products' present schedule, the service and inspection payment shall be $29.75 per week, which charge shall not be exceeded, pro-

vided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use or airplane or other extraordinary means of transportation incurred in connection with emergency service visits.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,

(Signed) R. E. ANDERSON,
Comptroller.

Accepted:

W. D. GROSS,

Exhibitor's signature witnessed by:

J. A. GAGE."

(Pr. Rec. Pages 189-190).

Ex. 4 is exactly like ex. 2 except that it relates to the Ketchikan theatre.

It will be noted that these agreements do not purport to be the agreements of appellant. Appellant's name is not even mentioned in them. True, they are written on appellant's letter-head, but the letter-head forms no part of an agreement written under it. If it did, many people—hotel-keepers, for instance—might find themselves entangled in strange and unlooked for complications. Happily, the courts have adopted a rule that prevents this. The rule is that printed matter in the heads of letters upon which a contract is written,

which is not referred to in the writing, is not a part of the contract.

Summers vs. Hibbard, 153 Ill. 102, 38 N.E. 800.

Lumber Co. vs. McNeeley, 108 Pac. 621.

In Summers vs. Hibbard it was held that the words, "All sales subject to strikes and accidents" printed on the caption of the paper on which was written the unqualified acceptance of a contract of purchase did not have the effect of reading them into the agreement thereby consummated. The court said:

> "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words "all sales subject to strikes and accidents," no more made those words a part of the contract than they made the other words there printed, "Summers Bros. & Co. Manufacturers of box-annealed common and refined sheet-iron," a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letterheads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

If, as the court says, the name of Summers and Co. did not become a part of that contract, the name of the Electrical Research Products Co. did not become a part of the contract now being discussed.

The second case cited follows the first.

These contracts, ex. 2 and 4, do not contain appellant's name and do not refer to the letterhead and they were not signed by appellant but by one Anderson who adds the word "Comptroller" to his signature without indicating who he is comptroller for. Nor does the letterhead show Anderson to be the comptroller for appellant. Now it is the rule that where an instrument is signed by an individual who signs as agent or representative it may be shown that he acted for a principal described in the writing; but in this case the alleged principal is not even referred to in the writing. Nor is the word "comptroller" synonymous with the word "agent"—a comptroller is not an agent at all. A comptroller, generally speaking, is one who examines accounts, not one who exercises the authority of another.

Nor is this all, ex. 2 and 4 refer to the contract to be modified as one relating to the "installation and use of 'Western Electric Equipment'." The original contracts are not for Western Electric equipment but for "Type 2-S equipment." It is true that this equipment is often referred to as Western Electric equipment, but the term Western Electric is not used in describing the equipment. The only reference to Western Electric Equipment in the original contract is in Par. 23, which provides for the termination of a previous agreement which did relate to Western Electric equipment. (Pr. Rec. Page 187).

Nor is there anything in the Record to show that Anderson had authority to execute these agreements in his own name as comptroller or otherwise and bind the company by so doing. His authority is defined in the two resolutions of the board of directors, as authority "to sign in the name and on behalf of the company contracts, etc." (See Rec. Page 192 P. R. and Page 193 Pr. Rec.) These resolutions certainly do not authorize Anderson to sign contracts in his own name.

The portion of the charge that submits the issue to the jury immediately precedes the portion specifically complained of, and is as follows:

> "In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as "Comptroller" without further describing himself, and that the question of whether said "Anderson" was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions." (Pr. Rec. Page 996).

The appellant takes no specific objection to this portion of the instruction; but the instruction must be considered as a whole, so that it becomes necessary to inquire into the whole matter, at least to some extent in order to show that the issue was fairly presented to the trial jury.

Turning now to that portion of the exception which reads: "that neither party is bound by the particular provision that only a President or Vice-Presi-

dent could change these contracts if they afterwards agreed to change them otherwise". The provision of the contract referred to in the exception reads:

> "No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the President or a Vice-President of Products or by such representative as may from time to time be designated in writing by either of such officers." (Pr. Rec. Page 186).

There is no evidence in the Record tending to prove that the contracts in question were approved in writing or otherwise by the President or Vice-President or by any other representative designated by such officers.

Now, where did Anderson's authority come from? The board of directors had authorized him to make contracts in the name of and on behalf of the company, but not in his own name. In any event the resolution did not comply with the provision of the contract because the board is not the President or Vice-President. Then, too, the action of the board was something to which Gross was not a party and about which he was not informed. Gage told him nothing about Anderson (Ev. Gross, R. P. P. 325). Nor could Anderson have power to modify this particular contract under any general authority conferred on him in the face of the specific limitation upon such authority contained in this contract. It requires no extended discussion to show that in such case the general authority

would be limited by a specific limitation such as that contained in the contract. Let us put the shoe on the other foot. Let us suppose that the appellee should bring suit to enforce these contracts and that appellant should set up Anderson's lack of authority as a defense. Does anyone suppose that Gross could prevail? He had solemnly agreed with appellant that there should be a limitation upon Anderson's power, and no subsequent agreement had removed this limitation. The consideration that would prevent a recovery by appellee, would also prevent a recovery by appellant.

Seemingly counsel invokes the legal principle, that if parties have the power to contract, they have the power to modify the contract made in any way notwithstanding limitations upon their power in this regard by the terms of the contract. But this stipulation is not a limitation upon the powers of the parties in respect to a modification of the contract; it merely provides that third parties, agents of appellant, shall not have power to bind appellant except in the manner prescribed. Now, it is idle to say that this provision has no legal effect—it is not against public policy—there is nothing wrong about it. The parties themselves may ignore limitations placed upon their own power, but this does not mean that third parties can ignore limitations upon that authority to which the parties have agreed. To adopt counsel's view would be equivalent to saying that under the provision a third

party cannot act except in the manner prescribed unless he chooses to act in some other manner.

The indefinite character of the exception has compelled us to cover a field much wider than the field we would have been obliged to cover if the exception had been more definite; and if the case were less important; we would be extremely reluctant to trespass further upon the time of the court by further discussing this assignment. But we feel compelled to call the court's attention to the fact that even though the court erred in giving this instruction, the error would be harmless, in view of the fact that the contracts, ex. 2 and 4, are void for other reasons and have, in any event, not been complied with by appellant.

First of all the Record is such that, as a matter of law, the signature of appellee, Gross, was obtained by duress. As has been pointed out, Gross and Cawthorn testify to facts that constitute duress. Appellant produced no evidence to contradict their statements except Gage, who was said to have made the threats. If Gage had denied these statements the question would have been one for the jury; but he did not in law deny them. True, he testifies that there were no threats and that the signature was voluntarily affixed; but he also made this statement:

> "I told him frankly that he must live up to the terms of his agreement or return the equip-

ment; I said "If you don't want to carry out your agreement, all right." I used such illustrations as "if you do not pay your telephone bill, your telephone will be disconnected." I pointed out to him that in accordance with his contract he was already in default and that it was only our leniency that kept him going as long as he did; without undue persuasion he signed the agreement and paid for thirty-two weeks' back service charges, together with some small amounts, bills of approximately $15.00; we discussed the question of payments and I told him that if he was to continue the use of the equipment he would have to perform all the provisions of the contract, including the payment of the weekly service charges." (Pr. Rec. Page 928).

Now, the general denials relating to threats made by Gage must yield to his specific statements upon that point. His admission of what he told Gross "frankly" is simply a mild, but neverthless effective, admission of what Gross and Cawthorn say he said. This admission leaves nothing for the jury to pass upon, so that duress is proved as a matter of law. If so, it doesn't matter whether the appellant did or did not execute the contracts.

Then, too, the contracts on their face show that they lack consideration. Appellant does not agree to do a single thing; it is only Gross that assumes obligations. The charge is to be paid as a service charge, but appellant does not agree to render the service. Nor does it help matters to say that the court will imply a covenant requiring the rendition of the service which

is to be paid for. If what seems to be the contention of counsel that "service" and "periodical inspection and minor adjustments" are synonymous terms, then the rendition of service would be no consideration for the reason that appellant was already legally bound to furnish "periodical inspection and minor adjustments." If the term "service" means something else—something additional—then the answer is that the service was never rendered. Ordinarily, the question of whether this service were rendered would be a question of fact for the jury; but in this case the uncontradicted evidence is such that the question becomes one of law.

In testifying to what service consisted of, Vice-President Wilcox testified:

> "plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away." (Pr. Rec. Page 292).

Now, if that is what service consists of, and Vice-President Wilcox would bind the corporation even if there were no other evidence upon the subject, there is not a scintilla of evidence tending to prove that any service was ever rendered. There never was a time when appellant kept a service man on call so that appellee could get service right away if anything went wrong. Appellant does not claim to have rendered Gross any service. All appellant claims is that one of its service men visited appellee's theatres at inter-

vals of about one month to make inspections, and, as their engineer Lawrence says, to sell parts and new equipment. It is not claimed that these service men ever repaired anything; although the record shows that the equipment was often out of repair, and that in each instance it was repaired by appellees own men—no service man was ever in sight when needed. At first, service men were sent up from Seattle—they stopped off at Juneau and Ketchikan while the boat was in port; later, Lawrence was kept in Alaska, but he was kept in Western and Interior Alaska most of the time, where he was far more inaccessible than he would have been if he had been in New York. With trains running on a one train a week schedule and steamers running as best they can, it ordinarily takes longer to get from Fairbanks and Anchorage to Juneau than it does from New York. Anyway, appellants never attempted to do more than render "periodical inspection and minor adjustment service"—the trips were made about once a month—seemingly just about often enough to keep the Alaska theatres supplied with parts and such newfangled equipment as appellant brought out from time to time. It follows therefor that there is no evidence that "service", as Vice-President Wilcox admitted it should be, was ever rendered—in fact, no attempt to do so was ever made. As a matter of law, therefore, appellant did not comply with the terms of the contract, so that it becomes wholly immaterial whether or

not the contract was properly executed by Anderson on behalf of appellant.

In its brief appellant asserts that the court erred in charging that the contract, to become valid, must be ratified by both parties, while appellant urges that ratification by appellant would be sufficient. The correctness of appellant's contention cannot be conceded; but even though it were correct it could avail nothing, because the point was not called to the attention of the trial court by any exception or objection at any time in any manner.

ASSIGNMENT NO. 5.

It is assigned as error that the court refused to instruct the jury as follows:

> "The defendant claims that under the original contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice-president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.
>
> "You are instructed that the plaintiff has submitted evidence tending to show that R. E. Anderson did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation

through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modiflying them, have been complied with."

To this ruling of the court the appellant took the following exception:

"The Court refused to give the foregoing instruction, either in words or substance, to which refusal plaintiff, in the presence of the jury and before it retired for deliberation, excepted." (Pr. Rec. Page 977).

Here again the grounds of exception were not stated; and, in view of what has already been said, the action taken by the court was so clearly correct that it is not necessary to say anything further about it.

ASSIGNMENT NO. 6.

The sixth error assigned is as follows:

"The Court erred in overruling the plaintiff's demurrer to the second and fourth counterclaims for failure to state facts sufficient to constitute a counterclaim to the amended complaint herein."

The demurrer appears on page 77 of the printed record and what purports to be an order overruling it with an exception to the ruling appears on pages 78-79 of the printed record; but neither the demurrer nor the order overruling it, in which the exception is incorporated, was made part of the record by bill of exceptions.

The Alaska statute, providing what the judgment

roll shall contain, after referring to cases where the judgment is by default, reads as follows:

> "In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment." (Compiled Laws of Alaska, Sec. 3711, page 738).

Now, the demurrer is a pleading and therefor part of the record; but the order overruling it is not an order that affects the merits or that necessarily affects the judgment. This is especially true in a case like this, where it is not assigned as error that the verdict of the jury relating to this counterclaim is not supported by sufficient evidence. In such case, the court will assume that there was sufficient evidence, and that, if there was anything wrong with the facts as pleaded, the pleadings were amended to conform to the proof.

Then, also, the court submitted the issue to the jury by instructing them as to just what was necessary to permit a recovery on these counter-claims. (Instruction No. 9, P. R. P. 1009). To the giving of this instruction no exception was taken and the giving of it was not assigned as error. The failure to except to the giving of this instruction constitutes a waiver on the part of the appellant, to any defect or deficiency in either the pleadings or the evidence in so far as they

relate to the issue so submitted to the jury without objection. A failure to object made the instruction the law of the case; if so, it must be presumed that the giving of it was warranted by the proceedings previously had—in other words, the pleadings and evidence must be presumed to have been sufficient.

But, there is nothing wrong with the pleadings in this case. The point sought to be urged is that duress is not sufficiently pleaded. Both counterclaims referred to in the exception are substantially the same except that one refers to the Juneau and the other to the Ketchikan contract. The second counterclaim provides in part :

> "That the defendant is, and at all times hereafter mentioned, was the owner of a motion picture theatre in the City of Juneau, which said theatre is known as the Coliseum Theatre.
>
> That for the purpose of equipping said theatre, the defendant did, on the 28th day of March, 1929, enter into a written contract with the plaintiff, a copy of which said contract is attached hereto, marked EXHIBIT "A" and is hereby referred to and made a part hereof.
>
> That under the provisions of the contract above set forth, the plaintiff did install, in the defendant's Coliseum Theatre at Juneau, the equipment described in said contract as the equipment which the plaintiff agreed to install in accordance with the terms of said contract. And the defendant paid to the plaintiff, the full sum of Ten Thousand Five Hundred Dollars ($10,500.00), as the principal, and interest in accordance with provisions of said contract, and in addition thereto, paid the sum of

Two Hundred Five Dollars ($205.00) freight, and Twenty-one ($21.00) cartage on said equipment.

That on or about the 30th day of December, 1929, the plaintiff threatened to remove and take from the possession of the defendant, all the equipment heretofore installed by it in the Coliseum Theatre as aforesaid, and deprive the defendant of the use thereof unless the defendant paid the plaintiff the sum of One Thousand Nineteen Dollars ($1,019.00), which defendant had not contracted to pay, and which was not due plaintiff, for pretended services, which the plaintiff never rendered, and told the defendant, then and there, that it had the power and the authority to carry out its said threats, and would do so if said amount were not immediately paid. That at the time said threat was made to the defendant, he had not yet fully paid the Ten Thousand Five Hundred Dollars ($10,500.00), due the plaintiff under the contract of March 28, 1929, although all payments due on account thereof had been paid, and the defendant was cognizant of the fact that a removal of said equipment would ruin his business, destroy the good-will he had established, and result in financial losses. The defendant not being sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believing that the plaintiff had the power to carry out its said threats, and would carry out its said threats, then and there paid the plaintiff the sum of One Thousand Nineteen Dollars ($1,019.00), because of the threats so made by the plaintiff, and under duress as aforesaid. And thereafter the plaintiff continued to threaten the defendant that unless he paid further amounts it would disconnect the equipment, and defendant believing that the plaintiff could and would carry out the threats, paid the plaintiff the following additional

amounts: February 10, 1930, $119.00; April 2, 1930, $238.00; November 1, 1930, $208.25; making a total of One Thousand and Five Hundred Eighty-Four Dollars and twenty-five cents ($1,584.25). (Pr. Rec. Page 44 et seq.).

DURESS.

At the early common law, duress consisted of imprisonment or of threats to do great bodily harm of sufficient severity to overcome the will of a courageous person. Later, duress of goods was recognized, and the rule was relaxed so that the severity need only be such as to overcome the will of a person of ordinary firmness. In this country, however, this arbitrary rule has been supplemented by a rule more conformable to reason. Here it is generally held, especially in the late cases, that, since assent is a necessary element in a contract, any act or threat on the part of one party to a contract which is such as to overcome the free will of the other party, is duress.

As early as 1877, Mr. Justice Field, speaking for the Supreme Court in the case of Radich vs. Hutchins, 95 U.S. 210, says: "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another from which the latter has no other means of immediate relief than by making the payment." Here threats against

the person and property are placed in the same class—either is held sufficient to constitute duress. In this case the Court had before it a payment which was claimed to have been made under duress; but, in this respect, the making of a payment does not differ from the making of a contract or the doing of some other act, so that the rule would be the same. The case, however, that probably had more to do with the establishment of the modern doctrine than any other case, is the case of Galusha vs. Sherman, decided by the Supreme Court of Wisconsin and reported in 81 N. W. 495. The opinion was written by Justice Marshall, who reviews the decisions and traces the growth and development of the law upon the subject in a way that leaves but little to be said. In summing up the result, Justice Marshall says in part:

> "From the foregoing it will be seen that the true doctrine of duress, at the present day, both in this country and England, is that a contract obtained by so oppressing a person by threats regarding his personal safety or liberty, or that of his property, or a member of his family, as to deprive him of his free exercise of his will and prevent the meeting of minds necessary to a valid contract, may be avoided on the ground of duress, whether the oppression causing the incompetence to contract be produced by what was deemed duress formerly, and relievable at law as such, or wrongful compulsion remedial by an appeal to a court of equity. The law no longer allows a person to enjoy, without disturbance, the fruits of his iniquity, because his victim was not a person of ordinary courage; and no longer gauges the acts

> that shall be held legally sufficient to produce duress by any arbitrary standard, but holds him who, by putting another in fear, shall have produced in him a state of mental incompetency to contract, and then takes advantage of such condition, no matter by what means such fear be caused, liable at the option of such other to make restitution to him of everything of value taken from him."

In the course of the opinion, also, Justice Marshall quotes with approval the language of the Supreme Court of Alabama, as follows:

> "The guilt or innocence of the alleged wronged party, or the lawfulness or unlawfulness of the threats, are immaterial, the material and only material question being, Was the threat made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?"

This statement is quoted with approval in a great number of the late cases.

The law upon this subject as it is at present recognized by the Federal Courts is fully stated in the case of Winget vs. Rockwood, 69 Fed. 2nd. 326, decided by the Circuit Court of Appeals for the Eighth Circuit, in 1934. In that case threats to do what would result in financial loss to a business enterprise were held to be duress. In the course of the opinion it is said: "Under the ancient common-law rule, legal duress existed only where there was such a threat of danger as was deemed sufficient to deprive a 'constant and courageous man of his free will.' Under this doctrine the re-

sisting power which every person was bound to exercise for his own protection was measured not by the standard of the individual affected, but by the standard of a man of courage. This rule was later modified to the extent that the standard was changed from that of a 'constant and courageous' man to that of a person of 'ordinary firmness'; but in these modern and less heroic days, the standard of resistance by which to test the alleged wrongful acts of duress and coercion has been further modified and softened. The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to deprive him of the free exercise of his will may be voided on the ground of duress. What constitutes duress is a matter of law, but whether duress exists in a particular transaction is usually a matter of fact. Meyer vs. Guardian Trust Co. (C.C.A. 8(296 F. 789, 35 A.L.R. 856. There is no legal standard of resistance with which the victim must comply at the peril of being remediless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health, and mental characteristics of the victim are all evi-

dentiary, but the ultimate fact in issue is whether such person was bereft of the free exercise of his will power. International Harvester Co. vs. Voboril (C.C.A. 8) 187 F. 973; Lipman, Wolfe & Co. vs. Phoenix Assur. Co. (C.C.A. 9) 258 F. 544; Adams vs. Irving Natl. Bank, 116 N.Y. 606, 23 N.E. 7, 6 L.R.A. 491, 15 Am. St. Rep. 447; Illinois Merchants' Trust Co. vs. Harvey, 335 Ill. 284, 167 N.E. 69; Beard vs. Beard, 173 Ky. 131, 190 S.W. 703, Ann. Cas, 1918 C, N.W. 495, 47, LRA. 417; Welch vs. Beeching, 193 Mich. 338, 159 N.W. 486; Nebraska Mutual Bond Ass'n. vs. Klee, 70 Neb. 383, 97 N.W. 476."

In another late Federal case, Henderson vs. Plymouth Oil Co. 13 Federal 2nd. 932-941, the Court had occasion to pass upon the validity of a note given under a threat to prosecute the maker's son. In passing upon this question the principles that underly the law relating to duress caused by threats are discussed. The portion of the opinion relating to this subject reads as follows:

> "It may be stated as an established rule that any contract produced by actual intimidation is voidable, not only where the circumstances were sufficient to intimidate a man of ordinary firmness but was sufficient to, and did, intimidate the particular person who was the subject of the coercion. It is also true that criminal proceedings may be regular, on a charge for which there is a probable cause, and yet, if the arrest is made for the purpose of extortion, for the purpose of compelling the doing of that which otherwise would not

have been done, duress exists, and the contract is voidable. It is said in Hackett vs. King, 6 Allen (Mass.) 58; "Though a person is arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest is thereby to extort money, or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same, or participated therein, for any such purpose; and a release or conveyance of property obtained by means of such arrest is void."

"Broadly stated, the law will not tolerate the employment of criminal process for the enforcement of a civil liability. Fillman vs. Ryan, supra. In International Harvester Co. vs. Voboril, 187 F. 973, 110 C.C.A. 311, it was held that duress may be caused by threats of criminal prosecution of husband, wife, children, or other near relative, though no crime has in fact been committed or prosecution begun. If the contracting party has been so put in fear as to be deprived of the free will-power essential to contractual capacity, the transaction may be avoided. In Galusha vs Sherman, 105 Wis. 263, 81 N.W. 495, 47 L.R.A. 417, the subject of duress is elaborately considered. The able opinion of Judge Marshall is epitomized in these words:

"The material and only material question being: 'Was the threat made for the purpose of overcoming the will of the person threatened, and did it have that effect, and was the contract thereby obtained?' "

Upon the question of what constitutes duress the more recent decisions of the state courts are in harmony with those of the federal courts.

The case of Rose vs. Owen, 85 N.E. 129, an Indiana case decided in 1908, is directly in point. The plaintiff, a real-estate agent, had a very doubtful claim against the defendant for commissions arising from the sale or transfer of land to a plantation company organized by the defendant. Plaintiff threatened to institute receivership proceedings against the plantation company unless defendant contracted to pay plaintiff $35,000 in installments. This defendant contracted to do in order to save the business of the plantation company and his reputation from being falsely attacked, and afterwards paid $12,000 on such contract, not as a ratification thereof, but to prevent the bringing of an action for a receiver by plaintiff until it was safe to repudiate the contract. It was held that the contract was voidable for duress, notwithstanding such payment. In the course of the opinion it is said: "The question in this case is whether there can be duress by threats such as are alleged in the counter-claim. Bush vs. Brown, 49 Ind. 573, 577, 19 Am. Rep. 695, the Court said: To give validity to a contract the law requires the free assent of the party who is to become chargeable thereon, and it therefore avoids any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made, or on that of his agent. Contracts made under such circumstances, are said to be made under duress. In Parmentier vs. Pater, 13 Or. 121, 126, 9 Pac. 59, 61, it is said:

> "Any course calculated to excite alarm which is resorted to by one party in order to coerce another to do an act detrimental to his rights and advantageous to the former is unlawful; and I do not think the law should make any distinction between means that are adopted in order to secure such ends. Where the threats actually or may reasonably coerce the will of the party threatened, and the contract results from such coercion there is duress. The injury feared would result if the receivership action was instituted, regardless of the merits of the case. Whatever defenses appellee or said company might have would be unavailable to avert the threatened injury since it must result before such defense can be interposed."

It was claimed that the contract was ratified by the payment of the $12,000; but the Court held that the plaintiff paid the money because he did not feel safe to do anything else, and that payment under such circumstances did not constitute ratification.

So, also, in the case of Harris vs. Carey, 71 S.E. 551, decided in 1911, by the Supreme Court of Virginia, it is said:

> "Nor can it be doubted that a contract procurred by threats inducing fear of destruction of one's property may be avoided on the ground of duress, there being nothing in such a case but the form of a contract wholly lacking the voluntary ascent of the party to be bound by it. To constitute duress it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils as inconvenience and loss by the

detention of property, loss of property altogether, or compliance with an unconscionable demand."

It will be noted that these late cases do not approve the doctrine announced in the earlier cases to the effect that it is not duress to threaten to do what one has a lawful right to do—such as the bringing of criminal prosecutions and civil suits. The law now is that if such threats are made for the purpose of coercion, the threats are unlawful notwithstanding the right of the person making the threat to do the thing threatened, and duress results. But to say that it is not duress to threaten to do what one has a lawful right to do, is equivalent to saying that it is duress to threaten to do what one has no lawful right to do. In this case, The Electric Company had no lawful right to remove the machines and bring ruin to the business conducted by Gross. Gross had complied with the terms of the contract and had paid all the installments then due. True, he had paid no service charges, but the contract did not provide for the payment of service charges. The very object of the Electric Company in seeking a modification of the contract was to provide for the payment of such charges. The original contract did not provide for the payment of service charges, so that a failure to pay them did not constitute a violation of that contract. Gross had complied with the contract; and having done so he was entitled to the possession of the machines, so that it was unlawful and wrong for the Electric Company to take them away from him.

In determining whether the facts alleged are sufficient, it must be borne in mind that the Court is called upon to do this by a demurrer not by a motion for a directed verdict. In the case of Winget vs. Rockwood, 69 Fed. 2nd. 326, above referred to, the point was raised upon a motion to dismiss a bill in Equity, which is equivalent to a general demurrer. In reversing the order granting this motion, it is said:

> "This motion to dismiss, under Equity Rule 29 (28 USCA 723) is in the nature of a general demurrer. All the well-pleaded facts are, for the purpose of this motion, taken as true. A suit should not ordinarily be disposed of on such a motion unless it clearly appears from the allegations of the bill that it must ultimately, upon final hearing, be dismissed. To warrant such dismissal, it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated. This Court in Ansehl v. Puritan Pharmaceutical Co., 61 F. (2nd) 131, 133, speaking through Judge John B. Sanborn, said: "Since such a motion to dismiss has taken the place of a demurrer, it is elementary that it admits all material facts well pleaded in the complaint, that only defenses in point of law appearing upon the face of the complaint may be considered, and that, unless it is clear that, taking the allegations to be true, no cause of action in equity is stated, the motion should be denied."

> "That rule of procedure should be followed which will be most likely to result in justice between the parties, and, generally speaking, that result is more likely to be attained by leaving the merits of the cause to be disposed of after answer

and the submission of proof, than by attempting to deal with the merits on motion to dismiss the bill."

True, there is a difference between a demurrer to a bill in Equity and a demurrer to a counter-claim at law, but the difference is not such as to make the doctrine announced inapplicable—the reason given applies as well in one case as in the other.

The foregoing was written and printed before appellant's brief was served, and what follows is in the nature of a reply to what is said in appellant's brief upon the subject now being discussed.

Appellant discusses this matter on page 35 et seq. of its brief in Point Five, entitled, "The Court erroneously over-ruled plaintiff's demurrer to the Second and Fourth Counter-Claims for monies alleged to have been paid the plaintiff under duress."

It appears from the brief of appellant that appellant no longer insists that the facts stated in the counter-claim do not show duress; appellant now maintains that the demurrer should have been sustained because the facts set up in the counter-claim are not such as can form the basis of a counter-claim in this action under the Alaskan Code. In presenting this point appellant's counsel proceed upon the assumption that an action of replevin is always one that sounds in tort, and upon the further assumption that the action is based upon nothing except the refusal of the defendant

to deliver the replevined property upon demand. To support this proposition appellant relies upon the case of McGarger vs. Wiley, 229 Pacific, 665. In that case, however, the contract which serves as the foundation for the plaintiff's action was not set forth in the Complaint; in the case at Bar the contract is set forth and the case itself can be distinguished from the present case in the manner that two Kansas cases were distinguished by the Supreme Court in a case to which reference will presently be made.

While the Supreme Court has set this whole question at rest by holding against the doctrine announced by the Oregon Court, it is interesting to note in passing that the reasoning employed by the Supreme Court of Oregon was not sufficiently convincing to satisfy Judge Bean and Judge McBride, both of whom dissented. However, in view of the decision by the Supreme Court in the case of Clement vs. Field, 147 U.S. 467; 13 Sup. Ct. Rep. 358, it is unnecessary to inquire into the reasoning advanced by the Supreme Court of Oregon. In that case the Court was called upon to pass upon the identical question before the Supreme Court of Oregon —that is to say, of whether in an action of replevin brought to recover a portion of property held under a contract of sale the defendant could set up a counterclaim claiming damages for breach of warranty in the contract of sale, and the Court held that this could be done. In passing upon the question it is said:

"Another objection urged to the judgment of the court below is that the action in replevin was an action founded upon tort, and not upon contract; that a set-off can, under the Code of Kansas, only be pleaded in an action founded on contract; and that hence the defendants in the replevin suit in question could not legally plead a set-off of the damages caused by the breach of warranty.

"The supreme court of Kansas disposed of this contention in Gardner v. Risher, 35 Kan. 93, 10 Pac. Rep. 584, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could, notwithstanding that the form of the action was replevin, avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortgage to comply with his contract.

"The later case of Kennett v. Ficket, 41 Kan. 211, 21 Pac. Rep. 93, is cited on behalf of plaintiff's in error as holding that a set-off cannot be pleaded as a defense in an action of replevin, because such an action is founded upon the tort or wrong of the defendant, and not upon contract. An examination of these two cases satisfies us that they are not irreconcilable. They were both suits in replevin, but in the earlier case the plaintiff's cause of action originated in the provisions of a chattel mortgage, and the suit in replevin was resorted to in pursuance of one of those provisions, and was regarded by the court as in substance founded on contract. The later case was founded on a wrongful taking by the defendant of property

of the plaintiff, and was therefore, in substance as well as form, an action ex delicto.

"The replevin suit pleaded in answer in the present case was substantially a proceeding in enforcement of contract provisions, and therefore within the decision in Gardner v. Risher, 35 Kan. 93, 10 Pac. Rep. 584."

It will be noted that in the case at Bar the Complaint sets forth the original contracts, the supplemental contracts, and the facts constituting the alleged breach upon which the right to recover the property is based.

The Alaska statute, as is pointed out by counsel for appellant in his brief, contains two sections. The first provides:

"First. A cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim."

Now the first question that arises is: Does this counter-claim, under which it is sought to recover these monies alleged to have been paid under duress, embrace a cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim? The contract is pleaded in the Complaint and the identical contract is pleaded in the counter-claim. Appellants claim the right to recover the equipment because certain service charges and certain charges for equipment were not paid in accordance with the contract. Appellee claims that these service

charges were not due under the contract and that he was compelled, by duress, to pay a considerable amount in the way of service charges which under the contract he had not agreed to pay; and that he was, under the contract, entitled to the possession of certain equipment of which appellant threatened to deprive him if these service charges were not paid; and that, because of the ruinous effect this would have on his business, he paid the service charges. This counter-claim, if well-founded, would, of course, defeat appellant's claim of something less than $100 for additional and spare parts, which, while it was not established by the evidence, was nevertheless included in the Complaint; and in addition to this it would result in reimbursing appellee for alleged service charges collected under duress. The whole matter forms but a single transaction which consists of a series of acts commencing with the signing of these contracts and terminating with the taking of the equipment under the writ of replevin.

The Courts, in construing this section of the Statute, are extremely liberal, not only because it prevents a multiplicity of suits, but also because liberality in its construction promotes the ends of justice—especially in such cases as the case at Bar. Here the appellant, a foreign corporation, comes to Alaska and invokes the aid of the Alaskan Court for the purpose of recovering a judgment against a resident of Alaska. Its business is not such as to require domestication, and the appointment of an agent upon whom service of

process can be made. If these matters required the bringing of an independent action, appellant could come to Alaska, litigate a portion of the differences existing between the parties, and then retire so as to compel the appellee to pursue it and bring action against it in the Courts at New York; obviously this would result in a denial of relief. It is just such situations as these that induce the Courts to adopt a liberal construction of these statutes, in order to compel parties to litigate all their differences in one action. Thus in the case of Advance Thresher Co. v. Klein, 133 N.W., 51, the Supreme Court of South Dakota held that in an action brought to recover a balance due from the sale of a threshing machine the defendant could set up a counter-claim for damages to his son resulting from the negligence of the agent of the threshing machine company. The facts, briefly stated, are these: The plaintiff had sold the defendant a threshing machine; it had agreed to keep the machine in repair, and defendant had agreed to help the plaintiff in making repairs. The plaintiff's agent, sent on one occasion to make repairs, called on defendant's boy to help him, and then suddenly started the machinery in such a way as to injure the boy. The boy, it was claimed, was helping as the representative of the defendant in connection with his agreement to help put the equipment in repair. The father had paid out a considerable sum as doctors' bills and had suffered other losses due to the boy's minority, and claimed a sum considerably in excess of the amount claimed due

on the threshing machine. The Court held that this counter-claim could be sustained under the statute. In passing upon that question it is said:

> "The principal contention of appellant is that the counter-claim is not connected in any manner with the contract sued upon, namely the notes; that the notes sued upon form the basis of the cause of action; and that the counterclaim must be connected with the contract sued on, and form a part of the transaction of the giving of the notes only. We are of the opinion that this contention is not tenable. The consideration of this question involves the construction of subdivision 1, Par. 127, Code Civ. Proc. A like provision is found in the Codes of many other states. In the case of Story & I. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671, the court held that the 'transaction' comprehended within the meaning of this section of the Code is not limited to the facts set forth in the complaint, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of the agreement, and if plaintiff omits or fails to set forth in his complaint the entire transaction out of which the claim arose, defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist on a judgment on that fact alone, if the fact is so connected with others that it forms only a portion of the transaction. See also 34 Cyc. 686 and 687. In the case at bar, the notes set out in the complaint constitute but a component part or portion of the entire transaction of the sale of the threshing machinery by plaintiff

to defendant. The contract of sale with all its mutual agreements and provisions, the acts of all the parties and their agents performed under and by virtue thereof in carrying out and performing the mutual provisions thereof, the repair of the engine, the assistance to be furnished in such repair on the part of the defendant, are all parts of one and the same transaction, just as much as the giving or the payment or nonpayment of the notes sued upon."

So, also, the Supreme Court of California in the case of Story & Isham Commercial Company vs. Story, 34 Pac. Page 671-673, referring to the matter under discussion says:

"One of the definitions given by the Century Dictionary to the term 'transaction,' is 'a matter or affair, either completed or in course of completion.' Mr. Pomeroy, in his treatise on Remedies and Remedial Rights, (section 774,) defines the term, as used in this section, to be 'that combination of acts and events, circumstances and defaults which, viewed in one aspect, results in the plaintiff's right of action, and, viewed in another aspect, results in the defendant's right of action,' and says, further: 'As these two opposing rights cannot be exactly the same, it follows that there may be, and generally must be, acts, facts, events, and defaults, in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone.' See also, Bank v. Lee, 7 Abb. Pr. 372; Ritchie v. Hayward, 71 Mo. 560; Judah v. Trustees, 16 Ind. 60. Every transaction is more or less complex, consisting of various facts and acts done by the respective parties; and it frequently happens that one or more of these acts would, if viewed by itself, be such a violation of

duty as to give to the other a right of action, but the obligation thus created may be so counterbalanced by other matters growing out of the same transaction that no compensation ought to be made therefor. While the parties are carrying their agreement into execution, and mutual rights and obligations accrue by reason of the failure of either or both of them to comply strictly with its terms, neither party should have the right, so long as the agreement is in force, and is in process of execution, to recover the damage sustained by him from any breach of duty by the other, without at the same time satisfying any obligation against himself growing out of the same affair. In such a case the rights of the one are so dependent upon the rights of the other, that simple equity requires that the respective causes of action in behalf of each should be adjusted in a single suit. From an early day the tendency of judicial decisions has been to avoid circuity of action and multicity of suits, by permitting matters growing out of the same transaction, which might constitute an independent cause of action, to be given in evidence by way of defense; and the foregoing section of the Code of Civil Procedure is an additional legislative step in the direction of this judicial tendency. As a corollary therefrom, it follows that the form in which the plaintiff may set out his cause of action ought not to be conclusive upon the right of the defendant to set forth his counterclaim in his answer. The plaintiff is to set forth the facts which constitute his cause of action; but, if the other facts in the transaction are so connected with those set forth as to defeat their legal effect, the defendant is not precluded from setting them up by reason of the form which the plaintiff may have chosen for presenting his own side of the case. Pom. Rem. & Rem. Rights, Par. 772; Gordon

v. Bruner, 49 Mo. 570; Brady v. Brennan, 25 Minn. 210; Bitting v. Thaxton, 72 N. C. 549; Thompson v. Kessel, 30 N.Y. 338; Chandler v. Childs, 42 Mich. 128, 3 N.W. Rep. 297. It is for the purpose of enabling the court to render a judgment by which the rights of the parties may be finally determined in the same action, that the Code permits a defendant to set up in his answer any new matter arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim; and, if the plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, the defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court. The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on this fact alone, if the fact is so connected with others that it forms only a portion of the transaction."

So also it is said by the Supreme Court of Colorado in the case of Bannerot v. McClure, 90 Pac. 70-71:

"In the enactment of the Code provisions, it was not intended to limit the defendant in his right to file a counter-claim to an action where the facts relied upon and alleged by him were identical with the facts relied upon and alleged by the plaintiff. The clear intention of the framers of the Code was that the court in one action should settle all matters in controversy relating to the contract or transaction which is the foundation of the suit. The word 'transaction' is much more comprehensive than the word 'contract.' Any cause of action, therefore, whatever its nature, arising out of the cause of action alleged in the complaint, or con-

> nected therewith, in favor of the defendant, and against the plaintiff, is a proper counterclaim. Any other construction would frequently defeat the ends of justice by preventing a full examination of the matter in controversy, where the rights of the parties were so dependent upon each other that they must necessarily be considered together to render a correct judgment."

In the case at bar, the right of the plaintiff to recover hinges on the construction of the contracts between the parties with relation to service charges; and the right of the defendant to recover on this particular contract hinges, at least to a very large extent, upon the same matters. All the dealings between the parties relating to these service charges, and relating to the equipment and the keeping of the equipment in appellee's theatre under the contracts, form part of a single transaction.

But the Alaska statute contains a second provision which reads as follows:

> "Second. In an action arising on contract any other cause of action arising also in contract and existing at the commencement of the action."

Now, under the Supreme Court decision above referred to, there can be no doubt that the present action, even though it is an action in replevin, is an action on contract. That being true, any other action also arising on contract may form the basis of a counterclaim.

Now it may be tort to extort money under duress,

but it does not follow that an action brought to recover monies so extorted is an action sounding in tort. When one extorts money from another, the law raises a promise to re-pay it, and when an action is brought to recover this money, the action may be brought on this implied promise; in other words, the victim from whom money has been extorted may sue in tort for damages or he may sue in contract to recover the money. At common-law, the form of action would be implied assumpsit, and in such cases it would be necessary to plead a fictitious promise to re-pay. But under the Code this is not necessary—under the Code it is necessary only to set up the facts—fictitious promises need no longer be averred.

Under this counterclaim the defendant does not seek to recover damages, but he seeks to recover the money paid—that is to say, he seeks to compel a repayment to him of the money taken from him—and the law raises the implied promise to re-pay. The action, therefore, is one sounding in contract; appellee has simply waived the tort and sued in assumpsit. This being true, the counterclaim is admissable as a cause of action arising on contract in a case where the action is founded on a contract. This is especially so because any recovery had on this counterclaim could be set off against monies claimed by appellant for spare parts or otherwise.

ASSIGNMENT NO. 7.

It is assigned as error that the court denied a motion to strike out Sec. D. of Paragraph 3 of the First and Fourth Affirmative Defenses, on the ground that the allegations are "irrelevant, incompetent, and immaterial."

The portion of the answer sought to be stricken reads as follows:

> "That the signature of the defendant to said paper writing, as it appears above, was obtained by duress, which consisted in this: At the time said signature was obtained, the defendant had not yet fully paid the plaintiff the full amount of Ten Thousand Five Hundred Dollars ($10,500.-00) to be paid it for installing and supplying the defendant with the equipment, and more fully described in the contract of March 28, 1929, but had fully complied with all the terms of said contract on his part and had already paid thereon all that was then due including the sum of $7,868.75 principal, and the interest thereon. That the plaintiff then and there threatened the defendant that unless he signed the paper writing above last set forth in full, in the manner thereon indicated, the plaintiff would immediately disconnect and remove the equipment supplied by it under the agreement of March 28, 1929, and deprive the defendant of the use thereof, causing him to lose all the monies theretofore paid, and leave him without equipment to operate his theatre. And the agent and employee of the plaintiff, by whom this threat was communicated to the defendant to-wit: J. A. Gage, told the defendant then and there, that the plaintiff had power to carry out said threat and could and would do so, under his contract of March

28, 1929. That the defendant was not sufficiently learned in the law to know his rights under the contract of March 28, 1929, and believed the statements so made to him by the representatives of plaintiff, in relation to such rights. And the defendant further believed that the plaintiff could and would disconnect and remove from his theatre, the equipment placed there under the contract of March 28, 1929 unless he complied with the request that he sign the paper writing, above referred to, in the manner indicated thereon. The defendant had a large sum, to-wit: many thousands, invested in a theatre building, and in the good-will of the business, which said good-will would be entirely destroyed if the equipment supplied him under the contract of March 28, 1929, were disconnected or removed. Especially so, since at that time, no other equipment to take its place, could be procurred by the defendant, all of which facts were well known to the plaintiff at the time, as well as to the defendant. That the defendant firmly belived that there was no way for him to save the large amount already paid, or to keep his business from being destroyed, except by complying with the demand of the plaintiff and its agent, that he sign the paper writing above referred to and so believing, and because of said threats, and not otherwise, the defendant placed his signature upon said writing at the point indicated upon said writing, for the sole purpose of protecting himself and his property against the unlawful threats made by the plaintiff as aforesaid."

The Compiled Laws of Alaska, 1933, Section 3437, provide in part as follows:

> "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of the adverse party."

It requires no argument to show that the defense of duress is not irrelevant or redundant matter in a case such as this. The defense cannot, therefore, be stricken out on a motion under the Alaska statute. If sufficient facts are not pleaded, the point can only be raised by demurrer. But, a glance at the facts pleaded, in the light of what has been said in discussing the preceding assignment upon the law of duress, will disclose that the facts are sufficient.

Since the foregoing was written and printed appellant's Brief was served, and from it, it is made to appear that appellant no longer contends that the defense of duress should be stricken from the answer because it is not properly pleaded. Counsel for appellant now takes the position that this defense should have been stricken because it was immaterial, for the reason that it makes no difference whether the contracts of September 4, 1929, were valid contracts or not, in that the obligation to pay service charges rests not upon the contracts of September 4 but upon the original contracts; the contention of counsel being that these contracts of September 4 were mere letters and not contracts at all, so that they didn't require the signature of appellee, and that this being so, it is wholly immaterial whether appellee signed them or not.

Now, we do not concede even for the purpose of argument that counsel's position is correct, but we do contend that, even though it were correct, the Court did not err in over-ruling the motion.

Paragraph Two of the complaint (Pr. Rec. P. 2) reads in part as follows:

> "* * * Plaintiff and defendant heretofore and on or about March 28, 1929, entered into a certain written agreement, and thereafter and on or about September 4, 1929, mutually modified said agreement, in which agreement, as so modified, they mutually agreed, among other things * * *."

The reply (Pr. Rec. PP. 92-93) reads in part as follows:

> "That on or about March 28, 1929, the parties hereto made and entered into that certain agreement bearing that date, a substantial copy of which marked Exhibit A, is attached to said Amendment Answer; that at the time of the execution of said contract said parties mutually agreed that the weekly charge for services to be rendered thereunder by plaintiff for periodical inspections had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto; that thereafter and under date of September 4, 1929, in pursuance to said agreement and for the purpose of modifying thereby said previous agreement of March 28, 1929, and to establish the weekly charge that plaintiff should make and which defendant should pay plaintiff for the periodical service to be rendered by plaintiff under the aforesaid contract of March 28, 1929, the parties hereto mutually made and entered into that certain agreement, a substantial copy whereof, marked Exhibit 2, is set forth in defendant's said Amended Answer; that said last mentioned agreement was actually executed by defendant in person on or about December 30, 1929."
>
> (Pr. Rec. P.P. 92-93).

Now it doesn't seem altogether right that appellant should attempt to convict the Trial Court of error because the Trial Judge adopted the view of appellant in accordance with which appellant holds out these documents of September 4, 1929, as contracts. Furthermore, even at this time counsel does not appear to agree with himself upon this point. In discussing Point III, (P. 26 Appellant's Brief) counsel complains bitterly because the Court gave an instruction under which these documents of September 4 might not be held valid as contracts. If it be immaterial whether they are contracts or not, why all this complaint? If counsel be right in his present contention, the instruction complained of under Point III. was certainly immaterial, and if erroneous, the error was harmless.

But counsel is not correct in the assumption that he now makes, to the effect that these alleged contracts of September 4 are immaterial in that the appellee's obligation rests upon the original contract and is in no way affected by the alleged supplemental contracts. Obviously, appellant did not take that view when the complaint was filed, for, according to its allegations above quoted, the obligations of appellee are made to rest upon both contracts—the original contract as modified by the supplemental contracts.

In the reply on page 93 it is said:

> "That at the time of the execution of said contract (meaning the original contract) said parties

> mutually agreed that the weekly charge for the services to be rendered thereunder by plaintiff for periodical inspections had not been established, and that the amount thereof should be later determined and mutually agreed upon by the parties hereto * * *."
>
> (Pr. Rec. P. 93).

It is then averred in the portion of the reply previously quoted, that the contracts of September 4 were entered into for the purpose of establishing a weekly charge to be paid. At the time of the trial, therefore, appellant did not believe that the original contracts provided for the payment of any service charges; and before the contracts were executed, appellant took the view that it was unwilling to execute a contract under which service charges were to be fixed, because of its inability to tell what the cost of such service charges would be in Alaska.

Appellant's witness Anderson, who acted as appellant's agent in executing the original contracts, and who also signed the alleged contracts of September 4 in his own name as comptroller, testified:

> "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the probable cost of furnishing engineering service for the theatres in that territory. It was consequently unwilling to enter into a contract which would fix the amount of its compensation for the rendering of such service when the cost of rendering it was still an un-

known quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank and this amount was later agreed to by the parties to the contract, Exhibit 7, through the medium of the subsequent agreement, Exhibit 2, and to the contract, Exhibit 3, through the medium of the subsequent agreement, Exhibit 4."

(Pr. Rec. PP. 169-170).

Immediately after the original contracts had been executed by appellant, and before appellee had received his copy, appellant's agent Gage told the appellee, in the presence of witness Cawthorn, that the contracts had been executed without service charges and without service, and that appellee would have to supply his own service.

(Ev. Gross, Pr. Rec. P. 317-8; Ev. Cawthorn, Pr. Rec. P. 476).

Neither Gage nor anyone else denies this conversation, and the appellee Gross thereupon made provision to service the equipment himself. Sometime later Vice President Wilcox made the statement, in the presence of Gross and Louis Lemieux, "That Gross has no service with us in Alaska." (Ev. Gross, Pr. Rec. P. 319; Ev. Louis Lemieux, Pr. Rec. P. 802).

While Wilcox denies having made this statement, the circumstances are such that he must have forgotten about it.

No bills for service charges were ever rendered appellee until after September 4, 1929; this notwithstanding the fact that the efficiency and vigilance of the Credit Department of the appellant is firmly established by the evidence in the Record. In the meantime, also, appellant tried to sell appellee extra equipment and supply him with electric soldering irons, for all of which appellee would have no use if appellant was to service the equipment. Then on top of all this, appellant resorted to coercive measures to compel appellee to sign the alleged agreements of September 4. If appellant's present position be correct, appellant's Comptroller Anderson, its agent Gage, its Vice President Wilcox, appellee, and everyone else who had anything to do with the negotiations for, or the execution of, the original contracts, misinterpreted them and did what they didn't intend to do; and appellant used coercive measures to compel appellee to sign a supplemental contract, which was wholly unnecessary and which conferred no benefits upon it even though valid. This evidence not only goes to show what interpretation the parties themselves placed on the original contracts, but it shows another and very important thing, and that is that it was not their intention that Paragraph 6 should be executed as part of the original contract at all, but that it was their intention to leave it out, and that for

that reason they left this paragraph incomplete by not filling in the blanks—and that is exactly the effect that the law gives to paragraph 6. The authorities upon this point have already been discussed on page 65 et. seq. of this Brief.

Counsel, in his Brief, maintains that the first part of Section 6 imposes the obligation to pay upon appellee and that the other portion in which the blanks occur is merely meaningless as though it were so much surplusage. The first part of Section 6, which counsel claims imposes the obligation, follows:

> "In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the 'Service Day' and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established."
>
> (Pr. Rec. P. 177).

Here counsel quits as though that were all there were in Section 6. He maintains that under this provision the appellee agrees to pay in accordance with whatever schedule the appellant at any time establishes; but the difficulty with counsel's contention is that the portion quoted is not the whole of Section 6. The language quoted is followed by the following:

> "Under Products' present schedule, the service and inspection payment shall be $——— per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of $——— per week."

(Pr. Rec. P. 177).

Counsel maintains that this portion of the section was rendered meaningless by not filling in the blanks, and that the effect of not filling in the blanks is simply this: That while this provision which contains the blank places a limitation upon the amount that can be charged by Products, the failure to fill in the blanks makes this provision meaningless so as to wipe out this limitation and give Products a right to charge whatever it pleases —in other words it takes off the limit. This would indeed make the contract a very remarkable document, under which one party agrees to pay whatever the other party may demand. But the decisions of the Courts do not permit the adoption of any such construction. In the case of Church vs. Nobel, 24 Ill. 292, discussed on page 65 of this Brief, the Supreme Court of Illinois held that blank dollars means no dollars, and that an agreement to pay blank dollars was an agreement to pay no dollars. Applying that decision to the facts before us, paragraph 6 of the Contract is made to read:

> "The amount of such payment shall be in accordance with Products' regular schedule of such charges as from time to time established. Under Products' present schedule, the service and in-

spection payment shall be 'No Dollars' per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of 'No Dollars' per week."

(Pr. Rec. P. 177).

And this decision of the Supreme Court of Illinois is in exact accord with the other decisions cited upon this point at page 66 of this Brief.

The effect of these decisions is simply to make the whole of section 6 inoperative. This contract was made upon a blank form supplied by appellant. The provisions of paragraph 6 didn't fit the case. The parties didn't print another blank form, but simply used the one they had and left the blanks blank with the obvious purpose of making the whole paragraph inoperative. According to the testimony of the Witness Anderson, appellant was unwilling to sign a contract with these blanks filled in. There was no way to tell what the cost of the service would be, and subsequent developments simply showed that the service couldn't be rendered at all. It was the evident intention to leave paragraph 6 inoperative, just as though it had never been, and this is also the intention that the Courts impute to the parties in such cases, as was said in Lore vs. Smith, 133 So. 214, to which reference has previously been made: "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause

should not become operative." Any other interpretation would lead to ridiculous conclusions, as the interpretation placed upon the contract by counsel for appellant at the present time would place upon appellee burdens that no rational man would assume. It may be true that a Court of law cannot relieve a party from the performance of obligations that are harsh and burdensome, but it is also true that a Court will not adopt a construction that will lead to the imposition of harsh and unusual burdens and that will lead to ridiculous conclusions, if the contract is open to another construction that is both fair and rational.

But, what is far more significant, the construction contended for by appellant would make the provisions of paragraph 6 void for uncertainty. There would be no way to tell the amount to be paid from the contract.

But, asserts counsel, the fact that appellant agrees under the provisions of paragraph 4 to make periodical inspections and minor adjustments, compels the conclusion that these periodical inspections and minor adjustments were to be paid for under the provisions of paragraph 6. But counsel fails to call the Court's attention to a provision in paragraph 8 which provides that the periodical inspection and minor adjustment service is not to be paid for at all. This matter was fully discussed on page 71 of this Brief and we will not therefore repeat what was there said. Counsel also overlooks the fact that section 6 provides for a service charge and not for a charge for periodical inspection and minor

adjustments. True, counsel elsewhere contends that these are one and the same thing, but it is alleged in the Answer that when employed by those engaged in the motion picture business the phrase "periodical inspection and minor adjustments" means the periodical inspection of, and the making of minor adjustments to, machinery or equipment that is in a state of repair; while the term "service" means the repair of equipment that is out of repair. At the trial evidence was offered to sustain these allegations, and the evidence upon the subject is all one way. Appellant produced no witnesses to deny the fact that this distinction exists, and that the meaning of inspection and minor adjustments is one thing, and the rendition of service quite another thing. The Witness Wilcox, appellant's Vice President, took the stand and testified—gave a definition of service—but he did not deny that service was one thing and the making of inspections and minor adjustments quite another thing. He left the testimony of appellee's witnesses upon this subject without contradiction. This subject was discussed by us on page 67 et. seq. of this Brief, so that it is not necessary to inquire into it any further at this time. It all goes to show that it was the intention of the parties to leave this entire section 6 inoperative so that appellant would not be obliged to render service, and appellee would not be obliged to pay for service, just as Gage told Gross after the contracts had been signed, and just as Wilcox told Taylor in the presence of Gross and Lemieux; and as has already been

pointed out, this is in exact accord with the decisions of the Courts. It may be added that if there were any doubt upon the subject that doubt would have to be resolved in favor of the apellee for the reason that the printed form was furnished by the appellant. The blanks left in the printed form were originally left there by the appellant, the contract was simply sent to appellee with no option except to take it or leave it. In such cases the contract must be construed most strictly against the party preparing it and furnishing the blanks. Upon this point all authorities are agreed.

In considering the effect of the blanks left in paragraph 6, it must be borne in mind that under the contract there are no agreements or understandings either express or implied not expressly set forth in the contract itself. This is so because of the express provisions contained in paragraph 20, which provides:

> "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates."
>
> (Pr. Rec. P. 186).

ASSIGNMENT NO. 8.

It is assigned as error that the court refused to instruct the jury as follows:

"You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff's exhibits Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof and to pay the transportation charges thereon.

"You are instructed that the evidence in this case shows that the plaintiff pursuant to that section of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $61.92, and that no evidence has been offered by defendant tending to show that those amounts were paid by him to plaintiff at the time of the commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action."

(P. R. Page 133-134).

An exception was taken, but no grounds of exception were stated. (Pr. Rec. P. 978).

Section 8 of the contract provides in part: "The exhibitor agrees to pay *** for any additional equip-

ment *** upon delivery thereof." (Pr. R. P. 178). There is no evidence in the record that the parts referred to in this instruction were ever delivered. Hence, there is no evidence to show that anything was due on account thereof. But there is abundant evidence to show that appellee had over-paid appellant to the extent of many thousand dollars under duress and otherwise. Hence, to give this instruction would be to instruct all of appelle's counter-claims out of the case. That there were large sums due the appellee will be made to appear in connection with the discussion of other assignments so that the matter need not be gone into here.

On page 22 of appellant's brief it is said:

> "On the trial, plaintiff proved by uncontradicted, documentary evidence that it furnished additional equipment and parts to the defendant; that the defendant received, and receipted for, this equipment; and that there was due and unpaid, when this action was begun, $29.09 for such equipment furnished at Juneau and $61.92 for such equipment furnished at Ketchikan."

Counsel is mistaken in this. Neither the documentary evidence nor any other kind of evidence proves what counsel says was established. The fact that these small amounts—$29.09 for Juneau and $61.92 for Ketchikan—were due and owing, is denied by the Answer. The only evidence offered at the trial by the appellant upon this subject was the evidence of one Pearsoll. He testified that appellee was charged with these

amounts on appellant's books. He also testified on page 299 of the Record as follows:

> "Plaintiff has the original orders for that spare parts and additional equipment and his receipts therefor, signed by defendant or his manager, which I now produce."

The Record then proceeds:

> "Whereupon said orders and receipts were received in evidence marked Plaintiff's Exhibit No. 26."

Now, the particular items for which suit was brought are described in the Complaint. Those furnished to the Juneau theatre are referred to on the bottom of page 6 of the transcript and on the top of page 7 as having been furnished between May 20, 1930, and February 17, 1931; and those furnished to the Ketchikan theatre are described on page 13 of the transcript as having been furnished between April 7, 1930, and February 18, 1931.

Turning now to Exhibit 26 and 27: they contain all the receipts signed by appellee, or his agents, for merchandise delivered; and, according to the testimony of Pearsoll, the receipts in these exhibits cover all the merchandise that was delivered. We find that exhibit 26 contains no receipts signed by appellee Gross or anyone else, although exhibit 27 does contain such receipts; but each and every one of these receipts were signed either by Gross, or his agent Charles Tuckett, or Louis Lemieux, prior to April, 1930, so that not one

of these receipts was a receipt for any of the merchandise sued for in the Complaint.

On the bottom of page 307 is one of two receipts for goods shipped that comes within the dates mentioned in the Complaint. It reads as follows:

> "Order dated 7-16-30 shipped to Coliseum Theatre, Juneau, receipted by J. S. Briggs, viz."

Now, while this receipt was signed, it wasn't signed by the appellee or any of his agents. J. S. Briggs was the agent of appellant: he was the man who was head of the Seattle Service Department, residing at Seattle, at that time, and had nothing to do with appellee whatsoever. He testified in this case as one of appellant's witnesses and supplies us with all this information.

(Ev. Briggs, Pr. Rec. P. 912).

On page 308 of the transcript is another order dated 7-16-30, shipped to Coliseum Theatre, Ketchikan, receipted by J. S. Briggs. This order also somes within the time, but this is the same J. S. Briggs who signed the receipt just previously referred to—he was the agent of appellant, and not the agent of appellee, as previously stated.

If these receipts, signed by Briggs, prove anything, they simply prove that these shipments were shipped from Los Angeles to Seattle, to Briggs, and that they are still at Seattle and never went any further, so that

there is not only a failure of proof that these items were delivered to appellee, but the receipts themselves show that they were never delivered to appellee but to Briggs.

But this liability exists, if it exists at all, under the provisions of par. 8 of the contract, which provides that what appellee agrees to pay to appellant for the articles of merchandise referred to is appellant's "list of installation charges as from time to time established." It is not only impossible to tell from the contract what the amount to be paid shall be, but the whole matter is left to the will of appellant—no one can tell what the price will be until appellant has expressed its will by establishing, from time to time, its lists of prices. Obviously, this provision is void for uncertainty. If merchandise were actually delivered under this provision, its reasonable value could be recovered on a quantum meruit; but a failure to pay such reasonable value would not work a forfeiture of appellee's rights under the original contract.

On page 24 counsel quotes the instruction that the Court did give with reference to the amounts due for additional and spare parts. He then criticises this instruction as being obscure and confusing, but when the instruction was given, counsel didn't object to it as being either obscure or confusing—no exception was taken to it. That being so, it became the law of the case, so that no further instruction upon that subject was

either necessary or proper, and the Court's action in refusing to give a further instruction was not error.

We do not wish to be understood as conceding that the instruction given by the Court, was open to the objection now made by counsel for the first time; we merely wish to be understood as saying that if counsel wished to make that objection he should have made it at the time the instruction was given, and that not having made it then, he cannot make it now. But as we have already pointed out, there was not only a failure of proof on the part of the appellant in that it didn't prove that these articles were ever delivered to the apepllee, but the appellee had also introduced evidence that he made over-payments in the way of monies paid under duress which were then in the possession of the plaintiff, and which, of course, would be a set off to any claim for spare parts or other merchandise.

ASSIGNMENT NO. 9.

Assignment of error No. 9 sets forth certain portions of instruction No. 8, leaving out the most material portions which explain and qualify the language excepted to.

> The exception reads: "Also take exception to instruction number 8, Your Honor, particularly upon the ground we claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event, and furthermore, that the defendant can not recover in

> this action upon his counterclaims in any event, and further, that portion concerning the purchase of new equipment, found on page 27 (last par.) of that particular instruction, which we contend is not an element of damages in this case. ***The same exception to instruction 10 as we took to instruction No. 8." (Pr. Rec. P. 1028).

The language employed in stating the exception is too general and does not point out any particular in which the court is alleged to have erred. It is said: "We claim that is not a true statement of the measure of damages." But the exception does not state what the true measure of damages is or in what particular the statement made by the court is in error. It is also to be noted that the portion excepted to does not contain a statement of the measure of damages at all—that is dealt with in a portion of the instruction not accepted to. It is there said, "and that no profits can be recoverable in this case in any event." Now, no one will contend that anticipated profits can not be recovered in a proper case; and this exception does not inform the court why this is not a proper case. The exception then proceeds: "and furthermore, that the defendant cannot recover in this action upon his counter-claims in any event." But it is not stated why the defendant cannot recover. To say that a party cannot recover, is not to point out a specific error in instructions. The exception continues, "and further that portion concerning the purchase of new equipment found on page

27 (last Par.) of the particular instruction, which we contend is not an element of damages in this case." Here is it said that the appellate contends that this is not an element of damages in this case, but it is not pointed out upon what the contention is based. The court's attention is not directed to anything except a contention of counsel in general and sweeping terms.

The exception does not bring up for discussion any specific law point. The only possible way in which it can be met, is to enter upon a more or less general discussion of the law applicable to the recovery of anticipated profits.

The leading federal case upon this question, is the case of Central Coal & Coke Co. vs. Hartman, 111 Fed. 96. This was an action for damages to business. After holding that, as a general rule, profits cannot be received, Judge Sanborn, speaking for the Court, says:

> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business and the monthly and yearly income he derives from it for a long time before, and for the time during

the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deducted." 1 Sedg. Dam. P. 183; Red vs. City Council, 25 Ga. 386; Kenny vs. Collier, 79 Ga. 743, 8 S.E. 58; Greene vs. Williams 45 Ill. 206; Hair vs. Barnes, 26 Ill. App. 580; Morey vs. Light Company, 38 N.Y. Sup. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain,

and incapable of recovery. In Goebel vs. Hough, 26. Minn., 252, 258, N. W. 847, 848, the Supreme Court of Minnesota said: 'When a regular and established business, the value of which may be ascertained, has been wrongully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such values cannot be ascertained without showing what the usual profits are."

"The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. Goebel vs. Hough, 26 Minn. 252, 256, 2 N.W. 847; Chapman vs. Kirby, 49 Ill. 211, 219; I Sedg. Dam. 182; Ingram vs. Lawson, 6 Bing. N.C. 212; Shafer vs. Wilson, 44 Md. 268, 278."

And referring to the character of proof that should be made, it is said:

"Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judg-

ment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established; there was no evidence of the amount of capital in the business; of its expenses or of its income, either before or after its interruption."

So, also, in the case of Homestead Co. vs. Des Moines Electric Co., 248 Fed. 439-445, the same judge says:

"It is true that the general rule is that the expected profits of a commercial business are generally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain

by competent proof what the amount of his loss actually was. It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, 98, 99, 102; 49 C. C. A. 244, 246, 247, 250. It is not, however, necessary in pleading such profits to set forth all the details of the requisite proof."

The rule permitting recovery in this class of cases is stated with clearness in the case of Yates vs. Whyel Cokè Co. 221 Fed. 603. This was an action for damages for breach of contract resulting from a failure to deliver coke of the quality specified in the contract. The opinion reads in part as follows: "It is well settled that, where a regular and established business is wrongfully injured, interrupted, or destroyed, its owner may recover the damages sustained, providing he makes it appear that his business was of that character and that it had been successfully conducted for such length of time that his profits from it are reasonably ascertainable—the correct rule for compensating the injured party being the ascertainment of how much less valuable the business was by reason of the interruption and the allowance of that amount of damages. As the value of such a business depends mainly on the ordinary profits derived from it, such value cannot be determined without showing what the usual profits are. Central Coal & Coke Co. vs. Hartman, 111 Fed. 96,

98, 99, 46 C.C.A. 244 (C.C.A. 8); Alison vs. Chandler, 11 Mich. 542, 558; 13 Cyc. 59."

In a recent case, Lumber Co. vs. Creamery, 18 Fed. (2nd.) 858, the Circuit Court of Appeals for the Ninth Circuit held that damages could be recovered for injury to the business of a creamery company.

The case of Wellington vs. Spencer, 132 Pac. 675, was an action to recover damages for the destruction of a hotel business as the result of a wrongful attachment. The Court say:

> "The next question presented is whether the closing of the hotel building and consequent destruction of plaintiff's business was an element of damage to which he was entitled. The decisions upon this question are not uniform. A number of cases hold that no recovery can be had for loss of profits. However, not many cases can be found supporting that proposition. A number of cases hold that no recovery for loss of profits occasioned by the destruction of business can be had unless the act which occasioned the loss was malicious. Kaufman vs. Armstrong, 74 Tex. 65, 11 S.W. 1048; Bucki Lumber Co. vs. Maryland Fidelity Co., 109 Fed. 393; 48 C.C.A. 436; Union Nat'l. Bank vs. Cross, 100 Wis. 174, 75 N.W. 992; Braundorf vs. Fellner, 76 Wis. 1, 45, N.W. 97. But a large number of well-considered cases hold that when the loss of profits is the proximate result of the unlawful act, and the amount is capable of proof to a reasonable certainty, the earnings of a business may be taken into consideration when assessing damages for the unlawful act. Smith vs. Eubanks, 72 Ga. 280; Stewart vs. Lanier House

Co. 75 Ga. 582; Chapman vs. Kirby, 49 Ill. 211; Lawrence vs. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Dobbins vs. Duquid 65 Ill. 464; Terre Haute vs. Hudnut, 112 Ind. 542, 13 N.E. 686; Moore vs. Schultz, 31 Md. 418; Lawson vs. Price, 45 Md. 123; Evans vs. Murphy, 87 Md. 498, 40 Atl. 109; Goebel vs. Hough, 26 Minn. 252, 2 N.W. 163. See Sedgwick on Damages (Par. 173 et seq.)."

"The reason that prospective profits cannot be considered in estimating damages is that they are uncertain and not capable of sufficiently definite proof to justify a verdict or decision as to their amount. The law does require reasonable certainty, but not more than that. In personal injury cases, where there is permanent disability, the juries are always permitted to consider the plaintiff's probable life duration, and this, in the face of the fact that we are constantly taught that life is uncertain and that no one is justified in presuming that he will live any particular length of time. The jury is simply permitted to use the best basis possible for estimating the damages. Why should not the same rule apply in cases where a business has been broken up or interrupted? Of course, juries will not be permitted to merely speculate as to damages. Where the plaintiff has just made his arrangements to begin business, and he is prevented from beginning either by tort or a breach of contract, or where the injury is to a particular subject-matter, profits of which are uncertain, evidence as to expected profits must be excluded from the jury because of the uncertainty. There is as much reason to believe that there will be no profits, as to believe that there will be profits, but no such argument can be made against proving a usual profit of an established business. In this case the plaintiff, according to his testimony, had an established business, and was earning a profit

in the business, and had been doing that for a sufficient length of time that evidence as to prospective profits was not entirely speculative. Men who have been engaged in business calculate with a reasonable certainty the income from their business, make their plans to live accordingly and the value of such business is not such a matter of speculation as to exclude evidence from the jury."

In the case of Allison vs. Chandler, 11 Mich. 542, the Court, speaking of Christiency, J., said:

"This business must not be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable * * * for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct, and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year, and he is ousted from the premises and this business is entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents damages for his loss? To ask such question is to answer it."

In Lambert vs. Haskell, 80 Cal. 611, 22 Pac. 327, the Court said:

"It is objected that the respondent was allowed to recover damages for the profits which he would

have made had he not been prevented by the injunction from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade? If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained could be inquired into. The best considered cases agree that, where an established business is wrongully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissable. Terre Haute vs. Hudnit, 120 Ind. 550 et seq., (13 N.E. 686); Chapman vs. Kirby, 49 Ill. 219; Simmons vs. Brown, 5 R.I. 299, 73 Am. Dec. 66; Gibston vs. Fischer, 68 Iowa, 30 (25 N.W. 914); Goebel vs. Hough, 26 Minn. 256 (2 N.W. 163); Shafer vs. Wilson, 44 Md. 268."

In the case of Chapman vs. Kirby, 49 Ill. 211, the Court said:

"As to the estimate of losses sustained by the breaking up of his established business, there would seem to be no well-founded objection. We all know that in many, if not all, professions and call-

ings, years of effort, skill, and toil are necessary to establishing a profitable business, and that when established it is worth more than capital. Can it then be said that a party deprived of it has no remedy; and can recover nothing for its loss, when produced by another?"

"It has long been well recognized law that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damages can be shown by demonstration. But by this means they can be ascertained, with a reasonable degree of certainty."

The question was decided by the Supreme Court of the Territory in the case of Tootle vs. Kent, 12 Okl. 674, 73 Pac. 310.

In the case of Ft. Smith & Western R. Co. vs. Williams, 30 Okl. 726, 121 Pac. 275, 40 L.R.A. (N.S.) 494, the general doctrine with reference to proving expected profits as an element of damages was considered, and a large number of authorities cited and discussed. It

was held in that case where a railroad company undertook to deliver a rotary swing, sometimes called a "merry-go-round," to be used at a picnic, knowing the purpose for which it was to be used, upon its failure to deliver same, it was liable for the profit that would have been made by the use of the swing during the progress of the picnic; and that opinion clearly points out that the reason evidence as to anticipated profits is excluded in many cases is because they are incapable of being proved with a reasonable degree of certainty."

In this case it was also held that damages to the property and the business constituted but one cause of action.

In the case of Denver vs. Bowen, 184 Pac. 357, the Supreme Court of Colorado say:

> "Loss of business is a very common element of damage in many kinds of cases, and the fact that such loss cannot be exactly determined is no reason why the wrong should go unredressed or the wrongdoer escape entirely at the expense of his victim."

The case of Sommer vs. Yakima, 26 Pac. (2nd.) 92, is a very recent case, decided by the Supreme Court of Washington. The action was for the destruction of a garage business. The Court say:

> "Appellant's second contention is that there was not sufficient evidence to justify an award to respondents Sommer for the destruction of their bus-

iness. The Sommers had a lease on the garage, which had two years to run. They had conducted their business profitably in the same premises for fifteen years. The owners of the building which had been burned did not replace it, and there was no other available location that the Sommers could obtain. So far as they were concerned, the business which they had established was totally destroyed, and we think that it cannot be forcefully argued that the destruction of their business was any less the result of the fire, and the wrong committed, than was the loss of the building itself or its contents. The damages were neither remote nor conjectural. (Seeley vs. Peabody, 139 Wash. 382, 247 Pac. 471.) The amount allowed by the jury for this item was $2,204.00. This amount was within the proof offered, and it cannot be said as a matter of law that the verdict in this respect is not supported by the evidence."

In order to determine whether the Court followed the law as laid down in the foregoing cases, in giving Instruction No. 8, it becomes necessary to consider the whole instruction—the portions excepted to, standing by themselves, are so fragmentary and incomplete that they do not convey any meaning unless read in connection with what follows and preceeds. The instruction, as given by the Court, follows:

"I further instruct you, Ladies and Gentlemen of the Jury, that the defendant set up two Counter-Claims to each of the Causes of Action stated in the plaintiff's complaint; and referring to the first Counter-Claim set up by the defendant to the plaintiff's first Cause of Action, I instruct you that if

you find from the evidence under my instructions that the defendant complied with all the terms of the contract, Exhibit "1" and paid to the plaintiff the full sum of Ten Thousand Five Hundred Dollars as principal, and paid the interest thereon in accordance with the provisions of said contract; and in all other respects complied with the terms of said contract to be kept and performed on his part; and that the alleged agreements bearing date of September 4, 1929, received in evidence as Exhibit No. "2", are invalid under the evidence and under my instructions; or that if valid the plaintiff has failed in any way to comply with the terms thereof; and further that the plaintiff cannot recover against the defendant under the first Cause of Action stated in the complaint; then I instruct you that the defendant has a right to recover a judgment against the plaintiff because of the first Claim set up in defendant's answer in such sum or sums as you may find he may be entitled to under these instructions.

I further instruct you that if you find that the defendant is entitled to recover from the plaintiff on his first Counter-Claim under the evidence and under my instructions, then I instruct you that he can recover: (1) The rental value of the equipment taken out of his Coliseum Theatre at Juneau for an unexpired portion of the lease embodied in his contract of March 28, 1929 *and in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is* $1,050.00 *per year, and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than* $8,458.30, *together with* 8 *per cent interest thereon from and after the date that such equipment was removed; and that the amount*

to be allowed by you on this item cannot be more than $9,627.03.

I further instruct you that if you find that the defendant is entitled to recover on his first Counter-Claim to the First Cause of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau Coliseum Theatre because of the removal of said equipment; provided, that he can only recover, if at all, such profits as he may have proved himself entitled to under the evidence and these instructions.

And in this connection I instruct you that where a loss of profits results from the destruction, interference or injury to an established business, such profits may be recovered where the defendant makes it reasonably certain by competent proof what the amount of his loss actually was. In this connection I instruct you that the interest upon the capital invested, plus the expenses of the business, deducted from its income, for at least a few months or a few years prior to the interruption produce the customary monthly or yearly net profits of the business during that time and form a reasonably certain and rational basis for computation from which the jury may lawfully infer what these alleged profits, if any would have been during the alleged interruption if it had not been inflicted.

In this connection and for the purpose of further defining what has heretofore been said, I further charge you that when a regular and established business, the value of which may be reasonably ascertained, has been wrongfully injured or interrupted, the true general rule for compensating the party injured is to ascertain how much less value the business was by reason of the injury or interruption, and allow that as damages. This

gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are. Proof of the expenses and of the income of the business for a reasonable time anterior to, and during and after the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

Expected profits, are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present the necessary data for a reasonable and rational estimate of their amount. In this connection, however, I further instruct you that the loss of profits, if you find that there was a loss of profits, must be the proximate, natural and direct result of the alleged wrongful act, provided always, that you find that the removal was unlawful under these instructions, and without the intervention of an independent intervening cause.

In this connection, *I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first Counter-Claim to the First Cause of Action, cannot be more than* $44,000; *that being the amount fixed by the pleadings of the defendant.*

I further instruct you that in addition to the rental value of the equipment, and in addition to the loss of profits above referred to, the defendant may further recover, if you find from the evidence and my instructions that he had a right to recover at all under the First Counter-Claim to the First

Cause of Action, for such expenses as he may reasonably and prudently have incurred in good faith in attempting to diminish damages such as are held recoverable under my instructions, and this is so whether the effort is successful or not, provided that it was in good faith. However, under this item, the defendant can only recover as in other cases such damages as he has actually proved.

He claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum Theatre at Juneau under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purpose above stated."

(Pr. Rec. Page 1005 et seq.).

The portions of the instruction to which an exception was taken were designated and pointed out specifically in the exception at the time the exception was taken, and they are as shown by the italics. No other portions of the instruction were excepted to. (Pr. Rec. Page 1026 et seq.).

In stating their grounds of exception, counsel for appellant use this language:

> "We claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event."

But, the portions of the instruction to which exception was taken do not relate to the measure of damages at all. The measure of damages is something that is dealt with in other portions of the instruction to which no exception was taken, and which are, because of that fact, the law of the case. Nor would it have availed the appellant to have excepted to these portions of the instruction for the Court in dealing with the amount of recovery follows the decisions above referred to with such care and fidelity that there can be no question about the correctness of what is said. True, in the first paragraph excepted to, the Court instructs that if the jury find that the defendant is entitled to recovery rental value, the amount cannot be less than that fixed by the plaintiff in the pleading nor more than that fixed by the defendant in his pleadings. But, surely, this has nothing to do with the measure of damages; it merely places upon the amount of recovery, if there be a recovery, the limitations placed there by the parties themselves. Paragraph VI. of plaintiff's (appellant's) complaint reads in part as follows:

> "That the rental value of said equipment is $1,050.00 per year or for any part of a year." (Pr. R. P. 8).

And the defendant (appellee) fixes the rental value at $9,627.03. (Par. IV. defendant's first Counter-Claim, Pr. R. P. 43). The amounts in each case are for each theatre.

The second statement included in the portion excepted to, is incomplete in that it does not embody all that the Court said upon the subject. The portion of the Court's charge contained in this second paragraph of the exception, standing alone, might be construed as an instruction to the effect that the defendant (appellee) was entitled to recover anticipated profits in any event. Even if there were nothing more to it, it would not be so bad; for the uncontradicted evidence shows that appellee was doing a profitable business in long established concerns at Juneau and Ketchikan when the equipment was taken out, and no one would attempt to deny that to take the equipment out of a theatre would interrupt the business. But, we are not called upon to justify the statement excepted to on this ground. In indicating the portion excepted to appellant abruptly stops in the middle of a sentence. The concluding portion of the sentence, which follows the semi-colon at the close of the statement excepted to, reads:

> "provided, that he can only recover, if at all, such profits as he may have proved himself entitled to under the evidence and these counter-claims."

The Court then tells the jury just when and under what circumstances anticipated profits can be recov-

ered, just what proof can be considered, and just how certain the proof must be before a recovery can be had. Upon all these matters, the Court not only follows the law as declared in the decisions above referred to, but he employs the very language of the decisions. To this portion of the instruction no exception was taken.

The third portion of the instruction referred to in the exception merely limits the amount of recovery to the amount fixed by the pleadings. In stating the grounds of exception, appellant does not point out why this was error, and it is impossible to conceive how the Court could have erred in doing what it did in this regard.

The next ground of exception reads: "and furthermore, that the defendant cannot recover in this action upon his Counter-Claims in any event." This ground of exception is so general that no one can tell what is sought to be included. If it brings up anything for discussion, it brings up every possible point in the whole case. It is not suggested why a recovery cannot be had on the Counter-Claim. This it not a case where the defendant merely seeks to recover ordinary damages occasioned by the wrongful retention of property taken under a writ of replevin; but a case in which the defendant seeks to recover on Counter-Claims arising out of and based upon the same contract and transaction that serves as a basis for plaintiff's complaint. Such damages as ordinarily result from the wrongful reten-

tion of property taken by replevin, can be recovered under the general issue; but under the facts in this case the damages are such that they are properly recoverable under Counter-Claims. The taking and retention of the property under the writ constitutes a wrong, but the wrong resulted in the breach of a contract—the property taken was property which the plaintiff had agreed not to take. It was wrong to take the property and it was also wrong to break the contract.

The next ground of exception reads: "and further, that portion covering the purchase of new equipment, found on page 27 (last Par.) of that particular instruction, which we contend is not an element of damages in this case."

When a person is injured by the wrongful act of another, he cannot stand idly by and permit the damages to accumulate. It is his duty to do what he reasonably can to reduce the damages as much as possible; and when he does this, he may recover such expenses as he may have incurred in good faith. The rule is thus stated in Sutherland on Damages. Third Edition, Sec. 88, Vol. 1, page 257-258.

> "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him. This is a

practical obligation under a great variety of circumstances, and as the damages which are suffered by a failure to perform it are not recoverable it is of much importance. Where it exists the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words, the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury or the part of it that such measures have or would have prevented. This is on the principle that if the efforts made are successful the defendant will have the benefit of them; if they prove abortive it is but just that the expense attending them shall be borne by him."

In the course of the opinion in Peck vs. Chicago Rys. Co., 110 N.E. 414, it is said:

"A person injured by another's breach of contract or tort is bound to use reasonable care to render the injury as light as possible and to protect himself from unnecessary injury. (Citing cases). Expenses reasonably and prudently incurred in good faith in making a proper effort to diminish the loss may be recovered, whether the effort is successful or not."

The case of Morrison vs. Queen City Electric Light & Power Co., 160 N.W. P. 438, decided by the Supreme Court of Michigan, is to the same effect.

The case of Den Norske American etc. vs. Sun Printing and Publishing Co. 122 N. E. 463, is an extreme case and most interesting. It was a libel case

growing out of an alleged libellous article published by the New York Sun concerning the plaintiff, which was the owner and operator of a line of steamers plying between New York and Norway.

The plaintiff claimed that the publication of this alleged libellous article greatly damaged its business, and in an effort to reduce the damages, plaintiff published in New York and elsewhere, and circulated newspapers, denials of the libellous statements published by defendant; that the cost of printing these denials was $2722.00.

In suing defendant, the plaintiff among other items claimed recovery of this sum of $2722.00. The trial court sustained a motion to strike this item of damages from the complaint. In reversing this, the New York Court of Appeals said:

> "Abundant reasons, in our opinion, support the conclusion that the injured party, at the risk of the wrongdoer, should be allowed, though not compelled, to attempt by a reasonable and proper effort to prevent damages liable to result from the wrongful act which has been committed against him. The alternative proposition is that the wrongdoer has the right to insist that the suffering party must sit still and allow damages to accumulate on the possibility that some time he may recover them. If the attempt is successful, it is for the benefit of the wrongdoer, and it is obvious that in securing the benefit of the effort he should pay the reasonable cost of it. The only chance for doubt would arise where the purpose failed, and even

then we think that if it is a proper one it should be at the risk and expense of the wrongdoer. It is his improper act that has promised the occasion and necessity for the effort, and he ought not to be allowed, by too narrow or rigid rules, to restrict the right of the one whom he has injured to seek to protect himself from harm or loss, by an attempt which, if it is successful, will be for the benefit of the offender himself. Where a wrong has been committed under circumstances which include the element of intentional, wilful and malicious injury, the author will be held responsible for the injuries which he has directly caused, even though they are beyond the limit of natural and apprehended results as established in cases where the injury was unintentional."

ASSIGNMENT NO. 10.

This assignment of error relates to the refusal of the Court to instruct as follows:

> "You are instructed that you cannot consider in ascertaining the amount of such net useable value, any good will or alleged loss thereof because I have heretofore stricken from this case all matters dealing with the question of good will and loss thereof, and, further, you cannot consider any alleged loss of profits in arriving at the amount of the net useable value of said equipments during said periods because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres." (Pr. R. P. 137).

To the refusal to give this instruction the appellant took a general exception, without stating any ground of exception. (P. R. P. 979). This exception is un-

availing because it is too general; but it is also unavailing for another and even more important reason. All the matters and things referred to in this proposed instruction were covered by those portions of instruction 8 (the instruction referred to under the previous assignment) to which appellant took no exception. The appellant not having excepted to those portions of instruction No. 8 relating to the matters dealt with in the proposed instruction, these portions of instruction No. 8 became the law of the case. If therefore the applicable law referred to in the proposed instruction differs from the instruction as given, the law as stated in the instruction as given governs.

Nor is there anything wrong with the action of the Court in refusing this proposed instruction. The Court in instruction No. 11 (Pr. R. R. 1018) instructed as follows: "You must eliminate from your consideration entirely any damages on account of loss of good will." This made it unnecessary to say anything further about loss of good will—the proposed instruction, in so far as it related to that subject, had been fully covered.

The remaining portion of the proposed instruction in which the Court is asked to charge the jury that profits cannot be recovered "because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres," cannot avail the appellant anything for the reason that the issue of whether or not the defendant lost profits

was submitted to the jury by instructions Nos's. 8 and 10, without exception on the part of appellant. Exceptions were taken to specific portions of these instructions, but not to the portions submitting this issue to the jury. Under the law of the case therefor, the submission of this issue was proper.

Again this matter, cannot be considered on appeal because the Bill of Exceptions does not purport to contain all the evidence, and the question of whether there is sufficient evidence cannot be considered unless all the evidence is in the Record. The Certificate to the Bill of Exceptions, reads:

> "*** do hereby certify that the foregoing Bill of Exceptions contains all the material facts, matters, things, proceedings, objections, rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, including all evidence adduced at the trial, material to the issues presented by the Assignments of Error herein." (Pr. R. P. 1031).

The Court here certifies that the Bill of Exceptions contains all the evidence adduced material to the issues presented by the Assignments of Error; but this is far from saying that it contains all the evidence. In fact, the statement "all the material evidence" implies that there was other evidence which was not deemed material. If appellant desired to present a question for review which required a consideration of all the evidence, it should have asked the Court to certify that the Bill of Exceptions contained all the evi-

dence. All the evidence presented must be deemed material when it comes to preparing a Bill of Exceptions. When evidence is adduced at the trial, the Court passes upon its materialty, and the ruling of the Court may be excepted to and reviewed on appeal; but when a Court settles a Bill of Exceptions and rules that certain evidence is not material, the ruling cannot be excepted to and cannot be reviewed. Obviously, the Court cannot pass upon the materialty of evidence in this conclusive way. Nor can the party preparing the Bill of Exceptions place the burden upon the opposing party—the burden of suggesting material evidence left out of the draft when presented—it is the duty of the appellant to prepare and present the Bill of Exceptions, and prepare a proper certificate for the trial judge to sign.

The printed transcript contains a document not made part of the Record by Bill of Exceptions—but it is listed in the praecipe as one of the papers appellant desired transmitted. It shows that the Bill of Exceptions as originally presented contained practically no evidence upon any subject. It would appear that appellant desired to have the Court certify that this proposed bill which contained but little evidence contained all the material evidence; and that its aim was thereupon to convict the trial court of error on the ground that there was a lack of evidence. (P. R. P. 1033 et seq.).

But there is enough evidence in the record to show that the Court was right in submitting the issue

to the jury—much less evidence would have been sufficient.

The evidence adduced showed that the appellant, under the writ of replevin issued in this case, took out the equipment in appellee's Juneau theatre on the 20th day of April, 1931; and out of the Ketchikan theatre on the 28th day of April, 1931; and that at the time the equipment was taken out of the Juneau theatre the defendant Gross had been operating this theatre for twenty-one years, and that at the time the equipment was taken out of the Ketchikan theatre the appellee Gross had been operating that theatre for a period of twenty-three years. (P. R. P. 317); and that at all times up to the times mentioned, both of these theatres had uniformly been operated at a profit. (Ev. Gross, P. R. P. 362-363-374).

When the equipment was taken out, under the writ of replevin, the appellee installed other equipment. This equipment was not as efficient as the equipment that had been taken out, but it was the only equipment that the appellee could get at that particular time. (P .R. P. 360-361). As the result of the installation of this inferior equipment the business of both theatres gradually went down. The appellee tried to make improvements in the equipment so as to bring it up to standard, but he couldn't do it—the result was that appellee suffered a loss of profits of from Two Thousand to Three Thousand Dollars a month in both

theatres. Appellee had always made money in both theatres until the equipment was removed. (P. R. P. 362-363). The appellee continued to lose money in both theatres until he made an arrangement with one Shearer, under which he turned the theatres over to Shearer. (P. R. P. 364). Shearer immediately commenced negotiations for the installation of Western Electric Equipment in both theatres. (P. R. P. 364-365). That was the same type of equipment that had been removed. Until the Western Electric Equipment was again installed, Shearer lost money, but immediately upon the installation of the Western Electric Equipment he commenced to realize a profit. (P. R. P. 366). Between the time the equipment was taken out by appellant and the time the new equipment was installed by Shearer, the losses were so great that the appellee was unable to pay his taxes and unable to meet his indebtedness at the bank. Appellee testified that he was unable to testify to exact amounts, adding that these would have to be testified to by his bookkeeper, but that he knew the facts above referred to by his own personal observation; and further testified that he had five other theatres at that time, all paying, and that the profits from these other five theatres were used to keep the Ketchikan and Juneau theatres open, besides a considerable amount of rent money that he collected from month to month. (P. R. P. 366).

The evidence shows that during the year 1929, at

the Ketchikan theatre, the receipts and expenses and the net profit earned were as follows:

EXHIBIT NO. 1.

PROFIT AND LOSS STATEMENT

1929

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$2,203.90	$2,166.46	$ 37.44	
February	2,222.15	1,876.30	345.85	
March	2,489.95	1,293.29	1,196.64	
April	2,697.50	1,539.29	1,158.21	
May	3,766.30	2,012.06	1,754.24	
June	5,931.00	2,270.17	3,660.83	
July	6,234.07	4,220.48	2,013.59	
August	7,519.70	3,236.05	4,283.65	
September	6,682.75	2,635.33	4,047.42	
October	7,209.70	2,698.26	4,511.44	
November	5,705.85	2,472.71	3,233.14	
December	4,314.20	2,497.11	1,817.09	
	56,977.07	28,917.53	28,059.54	
	28,917.53			
Proof	28,059.54			

Memorandum:

Net profit for year 1929	$28,059.54
Depreciation taken during year 1929	5,717.25
Actual net profit for year 1929	$22,342.29

(P. R. P. 485).

And the same data for the year 1930 is contained in the following exhibit:

EXHIBIT NO. I-1.

PROFIT AND LOSS STATEMENT

1930

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$4,462.30	$2,020.75	$2,441.55	
February	3,942.70	2,821.06	1,121.64	
March	4,310.35	1,654.74	2,655.61	
April	4,727.70	1,014.68	3,713.02	
May	4,848.35	2,725.71	2,122.64	
June	4,504.05	1,661.01	2,843.04	
July	4,821.25	2,599.36	2,221.89	
August	4,365.35	1,683.75	2,681.60	
September	5,625.75	1,479.67	4,146.08	
October	4,613.00	2,613.44	1,999.62	
November	3,741.25	1,633.44	2,107.81	
December	2,813.15	1,972.98	840.17	
	$52,775.20	23,880.53	28,894.67	
	23,880.53			
Proof	$28,894.67			

Memorandum:

Net profit for year 1930	$28,894.67
(Less)	
Depreciation taken during year 1930	5,717.25
Actual net profit for year 1930	$23,177.42

(P. R. P. 506).

And the same data relating to the year 1931 is contained in the following statement:

EXHIBIT NO. I-2.

PROFIT AND LOSS STATEMENT

1931

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$3,290.35	$2,457.70	$ 832.65	
February	3,059.05	2,418.61	640.44	
March	3,422.00	1,760.18	1,661.82	
April	2,987.15	1,613.95	1,373.20	
May	2,741.60	1,794.34	947.26	
June	2,877.05	1,831.52	1,045.53	
July	2,957.80	2,305.85	651.95	
August	2,853.20	1,862.08	991.12	
September	2,966.30	1,955.70	1,010.60	
October	2,607.40	1,098.31	1,509.09	
November	2,312.00	2,300.16	11.84	
December	1,438.35	2,313.71		$ 875.36
	$33,512.25	23,712.11	10,675.50	875.36
	23,712.11		875.36	
Proof	$ 9,800.14		$9,800.14	

Memorandum:

Net profit for year 1931	$9,800.14
(Less) Depreciation taken during year 1931	5,717.25
Net profit for 1931	$4,082.89

(P. R. P. 520).

And the profits and losses resulting from the operations of the Ketchikan theatre in 1932, after the equipment was taken out, are shown upon the following tabulation:

EXHIBIT NO. 1-3.

PROFIT AND LOSS STATEMENT
1932

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$ 977.84	$1,601.69	$	$ 623.85
February	1,428.90	1,544.44		115.54
March	1,414.75	1,691.84		277.09
April	1,491.10	1,104.87	386.23	
May	1,193.90	1,343.59		149.69
June	733.35	622.90	110.45	
July	1,047.63	1,044.33	3.30	
August	1,192.67	1,176.62	16.06	
September	1,387.20	1,633.80		246.60
October	1,784.13	1,226.86	557.27	
November	1,244.10	1,721.31		477.21
December	1,034.95	671.07	363.88	
	$14,930.52	15,383.32	1,437.18	1,889.98
		14,930.52		1,437.18
Proof		$ 452.80		$ 452.80

Memorandum:

Net Loss for year 1932	$ 452.80	
Depreciation taken for 1932	4,152.20	
	$4,605.00	(Loss)

(Pr. R. Page 534).

And the result of the operation at the Ketchikan theatre during the remaining months of 1933 prior to the leasing of the property to Shearer is shown on tabulation I-4, which is as follows:

EXHIBIT NO. 1-4.

PROFIT AND LOSS STATEMENT

1933

COLISEUM THEATRE

KETCHIKAN, ALASKA

	Total Receipts	Total Expenses	Net Profit	Net Loss
January	$1,004.68	$ 966.45	$ 38.23	
February ..	988.30	1,003.44		15.14
March	695.05	794.30		99.25
April	634.79	896.71		$ 261.92
	$3,322.82	$3,660.90	$ 38.23	$ 376.31
		3,322.82		38.23
Proof		$ 338.08		$ 338.08

Memorandum:

Net loss for year 1933	$ 338.08	
(Plus) Depreciation taken for (4) months	1,042.18	
		$1,380.26 (Loss)

House leased to B. F. Shearer on May 1st, 1933. (P. R. P. 548-549).

The average monthly profit for 1929, before the taking of depreciation was $2,328.29, and after the taking of depreciation was $1,861.85. The average monthly profit without depreciation during 1930 was $2,407.89, and after depreciation was $1,931.45; and that in 1931, it being the year when the equipment was taken out, after the month of April the average monthly profit declined gradually until it reached $816.87 before depreciation, and $340.24 after depreciation. In 1932, it being the year when the theatre was operated throughout the entire year without appellant's equipment, there was an average monthly loss before depreciation of $37.73, and an average monthly loss after depreciation of $383.75; and during the first four months of 1933, it being the period that elapsed before the Shearer lease commenced, there was an average monthly loss without depreciation of $28.17, and an average monthly loss after depreciation of $115.12. During the period that elapsed between May or June, 1929, and April, 1931, this being the period when the theatre was being operated with appellant's equipment, a period of 23 months, there was an average monthly profit before depreciation of $2,476.96, and after depreciation $2,000.52; and that for the period of approximately two years between the time that the equipment was replevined by the plaintiff and the time the theatre was turned over to Shearer, the average monthly profit before depreciation was $187.55 with an average monthly loss after depreciation of $187.70.

That there was an average loss of profits during the period while the theatre was being operated without appellant's equipment, after it had been taken out by appellant, before depreciation, of $2,289.41 and after depreciation of $2,188.22; and that the total loss resulting from the taking out of the equipment, based on the difference between profits earned before the equipment was taken out and profits earned after the equipment was taken out, calculated up to the time of the Shearer lease, before depreciation was $52,-656.43, and after depreciation of $50,326.06. (P. R. PP. 558-559-560).

After the Ketchikan theatre was leased to Shearer and while the old equipment was still in the theatre, the loss during May, 1933 was $203.68; (P. R. P. 561) during June, 1933 the loss was $343.79. (P. R. P. 562). The testimony is that the Western Electric Equipment was installed about two months after Shearer took the property over. (Ev. Gross, P. R. P. 365). During July of 1933 the Ketchikan theatre made a net profit of $177.94; (P. R. P. 562). During August of 1933 the Ketchikan theatre had a loss of $60.92; (P. R. P. 563) in September of 1933 the Ketchikan theatre made a net profit of $856.49; (P. R. P. 564) in October of 1933 the Ketchikan theatre made a net profit of $242.12. (P. R. P. 565). From then on the Ketchikan theatre showed slight losses during some months and considerable profit during others, but the general trend of the business was decidedly

upwards. (P. R. P. 566 et seq.) In November, 1934, the profits had risen to $1,555.32. (P. R. P. 573). This was higher than it was during the preceding or following month. The profit during the preceding month being $838.14 and that during the following month being $503.15, but it shows the extent to which the business had recovered after the installation of the plaintiff's equipment under the Shearer lease.

Similar statements showing the exact amount of receipts and disbursements and profits, month by month, for the Juneau theatre throughout the entire four year period covered by the Ketchikan statements were received in evidence. (P. R. PP. 578, 598, 614, 631, 647). On page 656 of the transcript is the statement showing the average monthly profit and loss for the Juneau theatre. This shows that the average monthly profit before depreciation, during the period commencing May, 1929, and ending May 1, 1931—that is to say the period while the plaintiff's equipment was installed in the theatre—was $1,404.46 and was $864.-15 after depreciation; and that the average monthly profit during the months following the taking out of the equipment until Shearer took the theatre over was $64.17 before depreciation and that the average monthly loss after depreciation, during that period was $489.98. That the difference in average monthly profit between the two periods was $1,340.29 before depreciation, and $1,354.13 after depreciation; and that the loss in profits resulting during the period after

the equipment was taken out was $32,165.96. (P. R. P. 656-657).

On page 658 et seq. of the printed Record occur statements of profits and losses after the theatre was taken over by Shearer. These statements do not show as great a recovery in business after the Shearer lease commenced in the Juneau theatre as was shown in the Ketchikan theatre, but this is due to special reasons which are explained by the witness Gross on pages 470-471 of the transcript.

The summaries above referred to were taken from the books of the appellee, and were prepared by the witness Tuckett who testified to their correctness. These books were received in evidence and marked as Exhibits H. up to and including Exhibit H-8. They were not incorporated in the Bill of Exceptions, but were transmitted to this Court by order of the Trial Court. These books contain all the records of the business transactions of the Coliseum theatre of Juneau, from 1927 until the date of the trial, and of the Alaska Film Exchange and also of the Coliseum theatre at Ketchikan, from 1927 until 1933. (Ev. Tuckett P. R. P. 482-483). The books are not formal but are altogether complete. The theatre business being a cash business they show the receipts from the box office from day to day; and the bills against the theatre being paid once a month, they show the monthly expenses, showing just how much was paid to each

person and what it was paid for. But while the books show all the receipts and expenditures in connection with the operation of the theatres, they also contain some other items relating to the conduct of apartment houses, and some other activities of the appellee Gross. This made it necessary to call as a witness the witness Tuckett who had been acting as manager for the appellee Gross throughout this entire period, and who knew what the various items in the books represented and what they were for, so as to be able to separate the receipts and disbursements of the theatres from these other items. The witness Tuckett made up from these books what are generally referred to in the evidence as work-sheets. These work-sheets are nothing more nor less than a complete set of books showing all the recipts of both theatres, and all the expenses of both theatres item by item during the entire four year period, which includes approximately two years of operation with appellant's sound-equipment installed, and approximately two years of operation after appellant had taken out the sound-equipment under the writ of replevin and until the theatres were turned over to Shearer. These so-called work-sheets were received in evidence those relating to the Juneau theatre being received as defendant's Exhibits K-1 to K-6 inclusive, and those relating to the Ketchikan theater being received as defendant's Exhibits I to I-6 inclusive. These so-called work-sheets are incorporated in the Bill of Exceptions; those for Juneau appear in the printed record

between pages 578-656, and those for the Ketchikan theatre occur in the printed record commencing on page 485 and continuing up to and including page 558. (P. R. P. 578-656; 485-558).

Referring to these Exhibits, the bill of exceptions shows that the witness Tuckett testifies: "That the items of expense shown on the work sheets attached thereto were taken from the books offered in evidence; that those books contained other items besides these, that it is just the same as these books; that he knows of his own personal knowledge what items belong to the Juneau Coliseum theatre; that he figured from the total items in the books those items only in making up these statements; that he knows from his own personal knowledge that those were the only items that belonged to the Juneau Coliseum theatre for 1929, and that that goes for all other statements that he had prepared that are to be offered in evidence." (P. R. P. 597).

The witness Tuckett testified to his personal knowledge of these various items at various times while he was on the witness stand. (Ev. Tuckett P.R.P. 504); (P.R.P. 708-709-710-712-720). On page 723 is a further statement bearing upon this matter where the witness Tuckett testifies: "I personally checked out all the items constituting that difference for March, 1929, the same way I did the other, by actual knowledge of what they were for based upon my personal know-

ledge." (P. R. P. 723). And on pages 653-654 the witness Tuckett testifies: "I carried 6 per cent on the capital investment as rent; those are the only items; all the other items were taken from my books as actually expended for the Coliseum theatre; they are correct; the allocation is fair; the work sheets show all the receipts and expenses, and the result in profit and loss; these statements (defendant's Exhibits series I and K, also J. L.) are all made on the same basis; the items of expense are taken from the books (defendant's Exhibits series H) in evidence; I know of my personal knowledge what items belong to the Juneau Coliseum Theatre, and only those items were used, and that goes for all these statements (defendant's Exhibits series I and K, also J and L); they contain only items in the books referring to the Coliseum Theatre; this property was depreciated by taking 5 per cent on buildings and things of that sort and 10 per cent on the machinery and furnishing; that depreciation was taken throughout." (P. R. PP. 653-654).

In cross-examination the witness Tuckett testifies that there were some small items in the books of the defendant which were left out of consideration in making up the I and K series of Exhibits, because he was in doubt about them. In re-direct examination on page 757 he testifies concerning these items as follows: "I stated that there were some small items left out of those accounts that I prepared; I could not say exactly without going over the whole statement which

they are, but Witness Stabler, who helped me make the accounts up—we took it under advisement and couldn't decide on the matter, whether it really belonged to the theatre or not so we left them out; the limit of the amount of them, I think would be around $250.00 which would cover it;" (P. R. P. 757). The witness Tuckett was thoroughly and widely cross-examined with relation to the correctness of the various items contained in the I and K series of Exhibits, and with relation to his knowledge concerning specific items. On the I and K Exhibits appears one column which is headed 'rent.' This column in truth and in fact represents the interest on capital investment. This matter is explained by the Witness Tuckett on page 504. (P. R. P. 504).

And on page 505 this witness testifies: "We made an actual appraisement of the Ketchikan theatre property in 1929, and the figure we used represented the result of that appraisal, of which we took 6 per cent and used that as rent, being in fact, interest on capital investment. (P. R. P. 505).

The capital investment at Juneau was arrived at in the same manner, and on the work-sheets the term "rent" means 6 per cent of the capital investment. (P. R. P. 652).

Statements containing summaries of these appraisements were offered and received in evidence and

marked as Exhibits I-5, page 555, and Exhibit K, page 575. (P. R. P. 555; 575).

The bank-books of appellee kept during the period above referred to were offered and received in evidence and marked as defendant's Exhibits U. U-1, and U-2; the bank statements supplied appellee by the bank from month to month, commencing with 1929 up to and including May, 1933, were also offered and received in evidence and marked as defendant's Exhibit X. Concerning Exhibit X the witness Tuckett testifies on page 712 as follows: "This large bundle of papers contains all the bank statements and checks covering the entire period from 1929 to May, 1933, including defendant's personal business, and also other business. By personal knowledge I could tell what these checks are; the checks are all here to back up the expenditures I have testified to, except one or two possibly which have been offered separately." (Ev. Tuckett, P. R. P. 712).

On page 765 of the Printed Record, it is shown that the bundle previously marked as Exhibit X was offered in evidence; and on page 766 Exhibit X was received in evidence. Exhibit X is not incorporated in the Bill of Exceptions except by reference; the original, however, was sent to this Court for inspection. It will be noted that the checks in the Exhibit are segregated by months and wrapped up in the bank statements for the respective months.

Exhibit U, U-1, and U-2, were incorporated in the Bill of Exceptions, and are shown on page 767 et seq. Now it is true that these books of the appellee contain many items that do not belong to either the Ketchikan or Juneau theatres, and that one not familiar with the books would, no doubt, find much difficulty in determining which items belonged to the theatres and which items did not; but the appellee called Mr. Tuckett, the man who had kept the books and who had personal knowledge of all the items, and he testified concerning them, and segregated the items that belonged to each of the respective theatres, and made statements referred to as work-sheets which showed the receipts and each item of expenditure, to whom paid, and for what paid; and the bankbooks and bank statements are offered to check the correctness of the items in the books and the statements made therefrom. And so, also, the checks for each amount paid out are in evidence so that anyone can check each payment of expenses incurred. Of course, the weight of the evidence depends to a large extent upon the confidence the jury reposed in the veracity of Tuckett; but the question we are now discussing is not, "What was the weight of the evidence" but, "Was there evidence to submit to the jury?" The question of its weight was for the jury and not for the Court. And in this respect these books of the appellee do not differ so widely from other books kept in a more formal manner. What accountant is there who will examine a set of books

in the absence of the man that kept them? Books are never so complete but what it is necessary, to their proper understanding, to have the man that kept them at one's elbow. True, Tuckett might tell false-hoods about these entries, but it is also true that a bookkeeper might make false entries in a formal set of books. In the last analysis the whole matter hinges upon the veracity of the bookkeeper. Ordinary books, under the modern doctrine, are received in evidence even though the bookkeeper by whom they were kept cannot be produced; it is only necessary to show that they were kept in the ordinary course of business. Here we have a set of books, to the correctness of which the bookkeeper testifies, and statements made from these books, which are verified on the oath of the bookkeeper item for item.

The appellant called as a witness, Mr. James C. Cooper, who represents himself and who, no doubt, is an accountant of wide experience. He testified on page 881 and elsewhere, that he had nothing to go by except the books themselves, and that he had drawn certain conclusions based upon his own judgment, and to other facts which lead to the conclusion that that was the best he could do because he knew nothing about the entries. He testified on page 882 that the entries could have been supported either by an invoice of supporting papers, or by the person who made the payments provided that he was truthful. He was then asked:

Q. If you had the man who made the payments and told you about these, you would know, if he were truthful.

A. If he were truthful, certainly.

(P. R. P. 882).

Mr. Cooper here tells the whole story. It all depends upon the truthfulness of Tuckett, and the question of whether Tuckett is truthful is one for the jury. If Tuckett testified truthfully the evidence received was as certain and as definite as evidence could possibly be made; it showed the profit in dollars and cents, with exact accuracy, during the two year period preceding the removal of the equipment, and it showed, with exact accuracy, in dollars and cents, the profits made and losses incurred during the two year period that followed after the equipment had been removed. It showed the exact amount lost in each theatre in profits during the period that elapsed after the equipment had been removed, as compared to the period during which the equipment was in the theatres. This is not only the best evidence that can be offered, but the only evidence, and satisfies in every respect the requirements of the decisions to which we have previously referred. Under this evidence the Court instructed the jury as follows :

"And in this connection I instruct you that where a loss of profits results from the destruction, inter-

ruption, interference or injury to an established business, such profits may be recovered where the defendant makes it reasonably certain by competent proof what the amount of his loss actually was. In this connection I instruct you that the interest upon the capital invested, plus the expenses of the business, deducted from its income, for at least a few months or a few years prior to the interruption produce the customary monthly or yearly net profits of the business during that time and form a reasonably certain and rational basis for computation from which the jury may lawfully infer what these alleged profits, if any, would have been during the alleged interruption if it had not been inflicted.

"In this connection and for the purpose of further defining what has heretofore been said, I further charge you that when a regular and established business, the value of which may be reasonably ascertained, has been wrongfully injured or interrupted, the true general rule for compensating the party injured is to ascertain how much less value the business was by reason of the injury or interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are. Proof of the expenses and of the income of the business for a reasonable time anterior to, and during and after the interrup-

tion charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

"Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present the necessary data for a reasonable and rational estimate of their amount."

(P. R. PP. 1007-1008).

It will be noted that these instructions given by the Court not only follow the decisions to which we have referred, but are in the very language of the decisions. The identical language is used by the Court in Instruction No. 8 and Instruction No. 10; and this portion of these instructions, as has already been noted, was not excepted to by the appellant—this, notwithstanding the fact that it submitted to the jury the issue which it now contends should not have been submitted at all. The instruction was fair, and the propriety of submitting the issue to the jury became established as the law of the case when appellant failed to except to the language of the Court; but above and beyond all this, the law and the evidence were such as not only to permit but to compel the Court to submit the issue to the jury.

After the foregoing had been written and printed, appellant served its Brief, in which the matters referred to are discussed on page 39 under Point VI.

In its Brief appellant urges two objections against the instructions of the Court, which are as follows:

> "A. The jury was permitted to award double damages;
>
> "B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectual."

Neither of these grounds is included in any exception taken at the trial; nor are they referred to in any error assigned.

Point A. is discussed on page 40 et seq. of appellant's Brief. It is there urged that under the instructions given, the jury were permitted to assess double damages. It is a complete answer to all that is said by appellant in its Brief that no exception was taken on this ground. Nowhere in the Record is there an exception on the ground that under these instructions, or any other instructions, the jury were permitted to award double damages. If appellant wished to avail itself of this point it was its duty to call the attention of the trial court to it, to the end that the trial court might correct the error if an error had been made. In the absence of such exception the point cannot be brought up for review.

But there is no merit in the point stated by counsel. It is true, that as a general proposition, double damages cannot be allowed, but under the instructions in this case the jury were not permitted to award double damages. It must be remembered that the appellant leased to appellee this theatre equipment for a period of ten years, and that appellee paid appellant, in advance, prior to the removal of the equipment, the full sum of $10,500.00 as rent for the equipment in each theatre; that is to say, the sum of $21,000.00 for the equipment in the two theatres, so that appellee had an estate or an interest in this equipment worth $21,000.00 at the time of its installation, and a proportionate amount to cover the unexpired term at the time of its removal. When the equipment was removed, this estate or interest was destroyed, and the rental value sought to be recovered was merely the value of this estate or interest which was destroyed by appellant; it amounted merely to a recovery of advance rent paid appellant by appellee. This amount appellee would have had a right to recover in any case, but in this patricular case the taking of the property had the additional effect of interrupting and interferring with a going, established business, so that it resulted in additional damages, and these additional damages consist of the profits that would have been realized if the equipment had been left in place. The authorities and cases cited by counsel have no application. In the cases cited, the property was taken and returned, so that there was no loss of

property, no diminution of the estate or interest in it, because the property itself was returned to the injured party. In the case at bar, the equipment was taken away and shipped out of the territory, and was never returned to the appellee, so that he lost all that he had paid the appellant as rent for the equipment during the entire remaining portion of the ten year period. When appellant broke its contract by wrongfully taking the equipment from the appellee, the advance rent paid by appellee for the remainder of the term was one of the elements of damage which appellee suffered and had a right to recover; and because of the fact that the taking of the property from appellee resulted in breaking up an established business, the profits that were lost were another item of damages which the appellee had a right to recover. It is not necessary to pursue this argument further, however, because the point cannot avail the appellant, for the reason that it was not included among the grounds of exception taken.

Referring now to Point B., which is discussed on page 42 et seq. of appellant's Brief, and which is to the effect that:

> "The jury was permitted to award damages for lost profits which were wholly speculative and conjectual."

The character of the evidence offered has already been discussed; and for that reason it is necessary only that we reply to the arguments of counsel set forth in his

Brief. Our discussion was had under Assignment of Error No. 9, and Assignment of Error No. 10. We are appending this to the discussion under No. 10 because it relates to what was said under both 9 and 10. But before doing this, we feel that we should again call the Court's attention to the fact that the matters here referred to by counsel were not embodied in any exception taken, and that portions of the instruction submitting the issue of damages to the jury were not excepted to at all on any ground. The propriety of submitting the issue to the jury was therefore established as the law of the case. But even though appellant did ask for an instruction, which though uncertain and indefinite in its terms might possibly be regarded as a request to take the issue from the jury, appellant cannot now contend that the Court erred in submitting the issue and refusing its instruction, because by failing to except to the instruction submitting the issue, which thereupon became the law of the case, it waived the point now sought to be urged. Then, too, nothing but a general exception was taken to the refusal of the Court to give this instruction so requested, and no grounds of exception were stated.

(Pr. Rec. P. 979).

Commencing on page 42 of apellant's Brief, appellant's counsel states the evidence as follows:

"When plaintiff removed its equipment from defendant's theatres, defendant replaced that

equipment with other equipment, which, although the best then obtainable, was inferior in sound quality to plaintiff's equipment. During the two years from approximately June 1, 1929 to May 1, 1931, while plaintiff's equipment was in defendant's theatres, defendant operated those theatres at an average monthly profit of $2,000.52 at Ketchikan and $864.15 at Juneau. During the period after plaintiff's equipment had been removed, from approximately May 1, 1931 to May 1, 1933, defendant operated those theatres at an average monthly loss of $187.70 at Ketchikan and $489.98 at Juneau, whereupon defendant leased both theatres to one Shearer who, shortly thereafter, removed the equipment then in these theatres and replaced it with plaintiff's equipment, similar to that originally installed and subsequently removed by the plaintiff. During the eighteen months immediately following the re-intallation of plaintiff's equipment in these theatres, Shearer, the lessee, operated the Ketchikan theatre at an average monthly profit of $629.70, and the Juneau theatre at an average monthly loss of $267.62."

This statement of the evidence is very incomplete, but it is fair enough as far as it goes. It should be borne in mind, however, in this connection, that both the Ketchikan and Juneau theatres were operated by Shearer for some considerable time with the inferior equipment installed, and that during this period his losses were as great as those sustained by Gross, and that the profits commenced to increase immediately after the installation of better equipment, and that the business which had been broken down because of the

inferior equipment was gradually built up after the new equipment had again been installed, so that the average monthly profit at Ketchikan, including the months while Shearer was operating with the inferior equipment, was $629.70, while the average monthly loss at Juneau, including the months while the inferior equipment was still in the theatre, was $267.62. And in this connection it must also be borne in mind that there were special reasons, already referred to, why the profits in Juneau did not increase to the same extent that those in Ketchikan had increased, under the Shearer management.

Thereupon, on page 43 of appellant's Brief, counsel submits the following conclusions:

> "(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.
>
> "(2) Defendant wholly failed to show the amount of such loss, if any, caused by the removal of plaintiff's equipment."

On page 43 of appellant's Brief counsel says:

> "It is well settled that lost profits cannot be recovered unless both the fact and the amount of such loss is established by something more than speculation or conjecture."

We fully agree with this statement, but we do not agree with counsel's conclusions as to what is required to satisfy the requirements mentioned. To support his

views, that appellee did not comply with these requirements, counsel quotes from the case of the Homestead Company vs. DesMoines Electric Company, 248 Fed. 439. This decision was rendered by Judge Sanborn, and was based upon a decision previously rendered by the same Judge in the case of the Central Coal & Coke Co. vs. Hartman, 111 Fed. 96.

Following the quotation set out by counsel occurs a citation of this case and no reference to any other authority, so that there can be no question but what Judge Sanborn intended, for all intents and purposes, to embody what was said in the Central Coal & Coke Company case, as part of what was said in the Homestead case.

Now, in the case of the Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, after stating that as a general rule profits cannot be recovered, Judge Sanborn said:

> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly income he derives from it for a long time before, and for the time during the

> interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital investment and the expense deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made, the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

Now, in the case at bar, appellee did just exactly what was required by the decision of Judge Sanborn last above quoted from. The capital investment was carefully arrived at, interest was allowed on it, the property was depreciated in a manner that was not questioned by anyone, the amount of the monthly expenses covering the business and the amount of the monthly income derived from it were shown not only for a long time before but also during the interruption of which appellee complains. In fact, the whole case was tried with a view of bringing it within the provisions laid down by Judge Sanborn; and under those circumstances Judge Sanborn says:

> "The interest upon his capital and the expenses of his business deducted from its income

> for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

The entire decision of Judge Sanborn in the Central Coal & Coke Company case is interesting, and a more extended quotation from that decision appears at an earlier point in this Brief.

At a later point in the decision Judge Sanborn indicates the character of proof required, and here again the decision was followed in the case at bar to the letter.

Following this quotation from the Homestead case, on page 44 of appellant's Brief, counsel makes the statement that the removal of appellant's equipment in April, 1931, could not have caused the defendant any loss of profits unless it caused a decrease in the number of persons attending defendant's theatres, and it is then contended that there was no evidence that the decrease was due to the removal of appellant's equipment.

Well, in addition to the fact that the appellee Gross, testified that there was a loss of business immediately after the inferior equipment was installed (Ev. Gross, Pr. Rec. P. 362); we have these uncontradicted facts before us—facts which are embodied in the statement of the evidence as counsel sets it forth on page 42 of his Brief. Plaintiff's efficient sound-equipment was taken out of a sound moving-picture theatre, and in its place equipment of an inferior character was installed. This was followed by a loss of attendance and a loss of profits. Now, would any rational person be warranted in assuming that this loss of attendance and loss of profits did not result from the fact that inferior equipment had been installed in the place of the efficient equipment that had been removed?

Counsel seems to be of the opinion that appellee should have called each of his customers who ceased going to the theatre after the inferior equipment had been installed, and who ceased going because the equipment was inferior. We are of the opinion that the trial court would soon have put an end to the calling of such witnesses.

If counsel's position upon this point were sound, one who had destroyed or interrupted a mercantile business, for instance, could not be called upon to pay damages unless the injured party brought in all his customers, who had to buy a yard of calico or a pound of sugar, and had them testify that this failure to buy

the calico and sugar was due to the injurious act of the person who had destroyed or interrupted the business —and like results would follow in connection with all other lines of business.

Counsel then says, on page 44 of appellant's Brief:

> "Under the evidence, as the case went to the jury, the decrease in attendance at defendant's theatres in May 1931-33 might have been caused by any one of many equally possible causes, other than the removal of the plaintiff's equipment."

Counsel then proceeds by assuming that the financial and economic depression was one of the causes for loss in attendance. This assumption is not based upon anything contained in the Record and is wholly at variance with the facts. The economic depression commenced in 1929 and was on throughout the period between 1929 and 1931 during which appellee made profits, as well as the period following the removal of the equipment when the losses occured. But counsel takes the position that the court very properly took judicial notice of the existence of this depression; if so, the Court would, with equal propriety, take judicial notice of the fact that Juneau, a town within its jurisdiction, is a gold-producing camp that thrived during the depression. No one testified that there was any depression in Juneau, and those who testified that there was a depression in Ketchikan also testified that the depression there commenced in 1929 and not at the time

the equipment was removed, although it was testified that the depression became worse later on.

Counsel complains because the appellee did not prove that the depression was not in any way to blame for the loss of his profits; but it was not for the appellee to prove the depression was not to blame for loss of profits. If a business depression were in fact in any sense to blame for it, it was for appellant to produce this proof. This very point was before the Supreme Court of Illinois in the case of Chapman vs. Kirby, 49 Ill. 211. In that case the Court used this language:

> "It has long been well recognized law that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damage can be shown by demonstration. But by this means they can be ascertained, with a reasonable degree of certainty."

It will be noted that the Court says:

> "And to measure such damages, the jury must have some basis for an estimate, and what more

> reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less?"

The burden of showing that the depression, or any other cause, had any effect upon the matter, therefore rested upon the appellant; nor could it be otherwise. If appellee were called upon to prove that the depression did not affect the situation, he would also be called upon to prove, for the same reason, that no other possible cause had had any effect upon it. A rule such as this would result in compelling the anticipation of one hundred and one defenses that would have no existence in fact.

The case cited by counsel on page 45 of appellant's Brief, Willis vs. S. M. H. Corporation, 259 N. Y. 144, has no possible application. The plaintiff in that case was a mere employee who had been discharged. He was not a man who had an established business that had been interrupted. True, part of his remuneration came from his solicitation of member to a Club, but no one would call this an established business.

Counsel next complains because it was not shown that the loss of business was not due to new competition. In the first place, there was no evidence of new competition. In Juneau, for instance, the Capitol Theatre had been operating for a long time as a sound-producing theatre. This theatre had been operated for

a matter of ten or fifteen years, and for some time at least, prior to the removal of appellant's equipment from the Coliseum Theatre, the Capitol Theatre had been operated with sound equipment installed in it.

(Pr. Rec. 847 Ev. Kubley)

It is true that during the winter of 1931 the Palace theatre was renovated and its name was then changed to the Capitol Theatre; and it is possible that because of this it became stronger competition, but the appellant proved this, and the jury evidently took it into consideration because, while appellee proved a loss of profits amounting to $28,888.10, the jury's verdict fixes the amount lost at Juneau at $19,440.00.

There was also evidence in the Record that some of the theatres in Ketchikan had been renovated about that time, and the jury evidently took this into consideration, as well as the depression existing at Ketchikan, for while appellee proved the damages to which he was entitled at Ketchikan to be $44,952.28, the jury only allowed him $12,320.00.

Appellant also complains because he says still another cause may have contributed to the loss in business, and that is the type of pictures shown, but appellee Gross testifies that he always at all times got the best pictures in the United States. Of course, these pictures might even then vary, just as the quality of sugar or calico might vary, but we don't imagine that counsel

would contend that a merchant whose business had been broken up would be called upon to show that the various items of merchandise he carried were, during the periods that were relied upon for the basis of comparison, of the same quality or equally salable. If the pictures had anything to do with it, then appellant could have established that fact by evidence, but it was not incumbent upon the appellee to anticipate this or any other similar contention or objection that appellant's counsel might make.

If these contentions of appellant's counsel were sound, it would lead to the establishment of a rule under which anticipated profits could never be proved and could never be recovered; but under the law as it is stated by the Supreme Court of Illinois in Chapman vs. Kirby, above referred to, it is only necessary to take the profits for a reasonable period next preceding the time when the injury was inflicted leaving the other party to show that by depression in trade, or other causes, they would have been less.

If any causes, such as counsel refers to, had anything to do with the reduction of profits, it was incumbent upon counsel for appellant to present evidence to the jury upon that subject.

On page 47 of appellant's Brief, appellant attempts to show that the box office receipts in appellee's theatres were progressively getting less both before as well as after the removal of the equipment. Now if this

were true that would be a point that apellant could have argued to the jury and the jury would have considered it, for obviously the whole matter would present a question of fact for the jury to pass upon, but the difficulty with the statement made by appellant is that it is very misleading.

Referring to Appendix A., attached to appellant's Brief on page 54, which shows the box office receipts at various times, we find that it is true, as counsel states, that in July, 1929, the box office receipts at Juneau were $6,308.40. This was when the sound equipment was first installed. It was then a new thing and probably for that reason or some other reason this was an especially good month—at no time were the box office receipts at the Juneau theatre as large. For the first four or five months, while this equipment was in, the box office receipts were especially high, but commencing with December, 1929, we find that they were something over $4,000.00—from then on the receipts were quite uniform, sometimes a little more and sometimes a little less. In December, 1930, for instance, they were something over $5,500.00. If counsel's methods were to be adopted, this would show a progressive increase between the box office receipts in 1930 over those of 1929—but it didn't, it simply shows that in the theatre business, as in every other business, the volume of business fluctuates more or less from month to month. In November of 1930, for instance, the receipts were only $3,900.00 and something—$1,600.00 less than they

were in the following month. This doesn't show that appellee's business was getting better in the fall of 1930—it simply shows that all months are not alike. The only way to arrive at the value of a theatre business, or any other business for that matter, is to take the average for a number of months, as we have done in this case.

But, turning now to the 1931 column on Appendix A. page 54, we find that in May, the first month after the equipment had been removed, the receipts dropped down to something over $2,000.00. Now, then, during the entire period that precedes the month of May, 1931, there was not a single month during which the receipts did not exceed $3,000.00; then as we go down the column for 1931, and down the column for 1932, we find that there is only one month when the receipts were as much as $3,000.00, and that was in August of 1931, not long after the equipment had been removed, and obviously before appellant's patrons had found out all about it, and even then it was only $3,100.00.

Now, turning to the Ketchikan schedule, counsel says that in July of 1929 the box office receipts were $6,200 and something, while in July of 1930 they had dropped down to $4,800. and something, and that in July of 1931, after the equipment had been removed, they had dropped down to $2,900. and something. Now this is all true enough, but it doesn't prove anything except that the business of theatres, as well as the busi-

ness of other institutions, fluctuates more or less from month to month.

But the table Appendix B. does show that following the removal of the equipment there was a marked decrease in the box office receipts not only for one month but for all months—there were no more big months after the equipment had been taken out. True, the customers probably kept coming for a while before they were discouraged by the inferior equipment, but the general average reduction in receipts is striking, and it is even more striking to note that in 1934, after appellant's equipment had been reinstalled by Shearer, during the months of November and December, the business had almost been brought back to what it was before the equipment had been removed. If these figures prove anything they prove that counsel's contention is wrong; but however that may be, this whole question is one for the jury and we will therefore not burden this Court by going into the Record to show what the testimony really proves. It may be stated, however, that here is some evidence in the Record giving the reason as to why the attendance during some months is larger than in other months, but these reasons apply with equal force during the period when the equipment was in and the period when the equipment was out.

On page 48 of appellant's Brief, counsel quotes from the testimony of the Witness McKinnon, who tes-

tified that he went to the theatre both before and after the removal of the equipment, and it may be parenthetically stated that McKinnon also testified that the new equipment that was installed after the appellant's equipment had been removed was very inferior as a sound-producing device to the equipment that had previously been in the theatre. But counsel quotes from this testimony to show that McKinnon didn't stay away. Well, no one ever contended that all the customers stayed away; if they had the theatre would have been closed; but it is also true that no one ever denied that many of the customers did stay away and that that resulted in a loss of profits.

It is hardly necessary to say that we do not concur in the view of appellant that it was incumbent upon the appellee to bring in as witnesses all his customers who stayed away because of inferior equipment. Clearly, if it were necessary to bring in one such customer, it would, for the same reason, be necessary to bring in all of them.

On page 49, however, after counsel had complained bitterly because witnesses were not called to prove that as the result of the removal of the equipment there was a loss of business, counsel complains because appellee was permitted to testify that after the removal of the equipment there was a loss of business. And it may be added, that appellee, while he testified in general terms, stated that his testimony was based upon

his own observations. And counsel adds that appellee's conclusions upon this point were destroyed by his own further testimony to the effect that he had five other theatres operating in Alaska in which this same inferior equipment was installed, and that these five other theatres made a profit. But counsel fails to add that appellee also testified at the same time that there was no R.C.A. or Western Electric equipment in competition with those theatres.

(Pr. Rec. P. 472).

But the Record also shows that these other theatres were small theatres in small towns.

(Pr. Rec. P. 835, Ev. Dalner).

And the fact that the equipment would work in a small theatre doesn't necessarily prove it would work in a larger theatre; it might have lead the appellee to hope that it would, but all the evidence is that it didn't, and we doubt very much that appellant would now, or at any time, seriously contend that this cheap equipment which appellee was forced to install when the better equipment was taken out of the theatre was such that it would draw as large a crowd as appellant's high-priced equipment would draw. Appellee was simply forced to install this cheap equipment because it was the best he could get, and the installation of this equipment was the only thing he could do to save his business from utter collapse by keeping his doors open and his theatre going.

Appellant's counsel then proceeds to consider the second proposition on page 49 of his Brief, and maintains that defendant has wholly failed to show the amount of his loss of profits, if any, caused by the removal of the plaintiff's equipment. In support of this proposition appellant quotes four and one half lines from the opinion of the Central Coal & Coke Company vs. Hartman, 111 Fed. 96. Immediately following the portion of the opinion quoted by counsel occurs this language:

> "The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly incomes he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

Had counsel read on until he had read the whole opinion, he would have found that the evidence in this case complies exactly with the requirements of the decision in the case of the Central Company vs. Hartman, in which this opinion was rendered. It should be noted that on page 50 of his Brief, counsel makes the statement that appellee had no competition until the opening of the Capitol Theatre at Juneau on January 15, 1931. This is an error as has already been shown. The Capitol Theatre at Juneau was renovated in January, 1931, but it had been operated as a theatre for many years and it had been operated with sound-equipment prior to that time.

(Pr. Rec. P. 847).

There is considerable evidence in the Record to show that appelllant had had considerable competition both at Juneau and Ketchikan prior to that time, but we do not consider it necessary to review it because the question of what effect incoming competition had was one for the jury, and the burden of proving of what the incoming competition consisted was upon the appellant, as we have already shown.

Counsel refers to the case of Freidman vs. McKay Leather Co. 178 Pac. 139, but that case is not in point. That was an action to recover for breach of an agency contract and not an action to recover prospective profits for the interruption or destruction of an established business. Even so, however, statements made by the

Court in that case are such as to indicate that the Court recognized the fact that where prospective damages can be proved with reasonable certainty, as they can be in a case where an established business is interrupted, such damages are recoverable.

Counsel then again returns to the case of Central Coal & Coke Company vs. Hartman, 111 Fed. 96, and quotes another portion of that opinion, including the statement:

> "And the monthly and yearly income he derives from it for a long time before and for the time during the interruption."

Counsel again breaks off his quotation too soon. He cites this authority with a view of showing that it is not sufficient to show what the profits were for a period of two years, and that two years, according to counsel's view, is not a long time, while the Court says "for a long time before"; but if counsel had added a few more lines to his quotation he would have been informed upon the question as to what the quotation meant by the use of the term "for a long time before", for immediately following the word "complains" with which he ends his quotation, occurs the following, "The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption." The term "for a long time" therefore means for a few months or years. In the case at bar the exact income for a period of two

years was established by appellee not only for a few months but it would be 24 months—many months.

In addition to this, however, there is other evidence in the Record, and it is that appellee had been conducting these theatres for a period of something like 20 years, and that during that entire period there had never been a time these theatres were not profitable and were not paying investments.

(Pr. Rec. P. 362).

While the exact amount of profits was only shown for a period of two years, we do not believe that any Court would permit a party to encumber the Record by showing what his exact profits were, from his books, for a period of twenty years, even though the books covering this entire period had been preserved, which would in no case be likely.

On page 53 counsel complains that the Verdict must have been speculative because the jury didn't award the appellee all the damages that he proved; in other words, the total amount proved for Ketchikan and Juneau were in each case much larger than the amount of damages allowed. But counsel forgets that the Courts permit the party inflicting the injury to introduce evidence of depressions, incoming competition, and of any other fact that would tend to lessen the damages; this is merely evidence allowed in mitigation. If the law permits the party inflicting the in-

jury to offer such evidence, it must follow that the jury have a right to consider it. In this case the jury evidently considered the evidence offered by appellant upon these points, and reduced accordingly, the damages, that would otherwise have resulted. Surely appellant shouldn't complain of that.

Moreover, the verdict is not objected to on the ground that it was speculative, nor is that point urged by any exception or error assigned anywhere in the record.

Counsel says that no case could be found to better illustrate the injustice of allowing the jury to mulct a party in large damages. Counsel's position evidently is that appellant should be allowed to lease this equipment, collect the rent for ten years, at the end of two years take it out, keep the equipment and also the advance rent that had been collected, and that if the taking out of the equipment destroyed appellee's business it was just too bad. We do not think that any such doctrine finds any support in the law. It is correct to say that as a general proposition speculative damages cannot be recovered in any case, but this does not mean that damages must be proved to a mathematical certainty. Damages are allowed for pain and suffering, for injuries depending for their severity upon the uncertain duration of life, for loss of earning power, the value of which must necessarily depend not only upon the duration of life but also upon the opportunities to

earn that the future may present, and for one hundred and one other things that are such that the amount of the damages cannot be determined with mathematical exactness, but it must be left to the sound discretion of the jury. All that the law requires is that facts be established from which the jury can establish the amount with a reasonable degree of certainty. The authorities we have cited, and from which we have quoted, establish the fact that the appellee in this case produced evidence of facts that in every way meet this requirement of the law; and counsel has produced no authorities whatever to show that this requirement has not been met.

We have discussed the cases cited by counsel, and a glance at the text of "The Restatement of the Law of Contracts" including what precedes, as well as what follows the portion quoted, will show that that work in nowise supports counsel.

ASSIGNMENT NO. XI.

Assignment of Error No. XI relates to the refusal of the Court to give the plaintiff an instruction to the effect that the defendant could not recover on account of the purchase or cost of installation of new equipment. This point has already been fully discussed in connection with our discussion of Assignment of Error No. 9. Moreover, the exception taken to the action of the Court is general in its terms and states no

grounds, so that it raises no question of law. (See Page 165 of this Brief).

ASSIGNMENT NO. XII.

This alleged error is not relied upon in appellant's brief as ground for reversal.

This Assignment of Error relates to a ruling of the Court, under which the appellee Gross was permitted to testify that, as a result of having inferior equipment after the better equipment had been removed by the appellant under the writ of replevin, he lost business and profits in both of his theatres. The competency and materiality of this testimony depends upon the question of whether there was evidence in the case that was such as to permit the recovery of lost and anticipated profits. As has already been pointed out, both of the theatres—the theatre at Ketchikan and the one at Juneau—had been operated by him for something like twenty years. The business of both theatres had always been profitable; the exact amount of profits realized during a period of about two years prior to the removal of the equipment was shown in dollars and cents, and was shown to be very large. All of this testimony appears in the Record and has been previously commented upon, so that it need not be gone into in detail at this time. Nor did the appellant attempt to deny that the appellee had a going established business from which he was realizing large profits at the time the equipment was taken out.

Now, there is no dispute in the evidence about the fact that the equipment was taken out by appellant, and it cannot be disputed or denied that the taking of the sound-equipment out of a talkie theatre is bound to have the effect of interrupting the business of the theatre. There was evidence also tending to prove that the taking out of the equipment by appellant was wrongful, and was not justified under the contract existing between the parties. Under these circumstances, there can be no question about the admissability of evidence relating to lost and anticipated profits, for as has already been pointed out in the decisions, such profits can be recovered if established with reasonable certainty in any case where an established business has been interrupted. (See Page 146 et. seq. this Brief).

It may be true that standing alone the evidence given by the appellee Gross in general terms would not be entitled to such weight—it would have to be supported by more detailed and specific evidence; but the fact that it was not in itself entitled to much weight did not affect its admissability.

ASSIGNMENT NO. XIII.

This alleged error is not referred to in appellant's brief.

This Assignment of Error relates to a ruling of the Court made in sustaining an objection to the admission of certain Exhibits, marked for identification

as No's. 43, 44, and 53. No. 43 consists of several documents fastened together. These include printed "Form 1040—Treasury Department—Internal Revenue Service" and is headed: "Individual Income Tax Return for the calendar year 1929—W .D. Gross, Juneau, Alaska; Occupation Motion Pictures." And forming part of the same Exhibit as offered are a letter from the Internal Revenue Service to Gross, dated February 3, 1932; a printed form of letter from David Burnet, Commissioner of Internal Revenue, to Gross, dated February 3, 1932; a typewritten statement headed "In re: Mr. W. D. Gross, Juneau, Alaska. Tax Liability year 1929"; printed form 870, Treasury Department, (in duplicate) headed: "In re: Mr. W. D. Gross, Juneau, Alaska; waiver of Restrictions on Assessment and Collection of Deficiency in Tax", which is unsigned; a printed notice reading, "That this is a copy of the report of the Examiner on the Income Tax Return", to which is attached a printed form of letter No. 850, dated Dec., 1931, addressed to the defendant, and headed: "In re: Income Tax. Date of Report: Dec. 17, 1931. Recommendation, etc"; and to this letter are attached five typewritten sheets containing detailed statements of the adjustments in defendant's income tax return, followed by a printed form relating to the statements of the total tax liability, previously assessed taxes, and the adjustments proposed in the accompanying report, making a statement of the deficiency; the correct tax, followed by a letter dated Dec. 26, 1931, from the defendant to the Internal

Revenue Agent relating to these matters; and this in turn is followed by a letter dated January 4, 1932, to Gross from George C. Earley, Internal Revenue Agent in Charge. All these papers are attached together and are offered as one Exhibit, numbered 43. The Exhibit is described in an abbreviated form on page 139 et seq. of the Printed Record, but the original bundle of papers offered as one Exhibit under No. 43, as well as those offered under 44, and 53, were transmitted to this Court for inspection.

No. 44 consists of a proported copy of an income tax return made by Gross for the year 1930. As part of the Exhibit offered, and attached thereto, is a Notice with a copy of the report of the Examiner of Income Tax Returns; and a letter upon the stationery of the Treasury Department, Internal Revenue Service, dated 528 Republic Building, Seattle, Washington, July 8, 1932, addressed to W. D. Gross, Juneau, Alaska, headed: "In re: Income tax. Date of Report: June 21, 1932. Years Examined: 1930", and stating in substance that "enclosed is a copy of the report covering examination recently made by a representative of this office concerning your income tax liability which is furnished for your information and files." This letter contains numerous other statements, and is signed by George C. Earley, Internal Revenue Agent in Charge; and to this letter are attached 36 sheets of typewritten matter, giving a detailed statement of the Internal Revenue Bureau's adjustment of the de-

fendant's Income Tax Return. All of these papers, including the proposed copy of the Income Tax Return, and the letters and other statements from the Internal Revenue Department, were attached together and offered as one Exhibit, No. 44.

The other Exhibit offered, being plaintiff's Exhibit marked for identification as No. 53, also contains a proported copy of an Income Tax Return for the year 1932, for W. D. Gross and wife. Attached to this and forming a part of the bundle offered as one Exhibit, is a letter from George C. Earley, Internal Revenue Agent in Charge to W. D. Gross and Wife. This letter is dated at Seattle, Washington, July 26, 1933, and is headed: "In re: Income Tax—Years Covered: 1932."

Exhibits marked for identification as Nos. 43 and 44, are offered at the same time and together, to which the following objection was made:

"Object to them as irrelevant, incompetent and immaterial. They have been properly submitted to counsel for the purpose of interrogating a witness on such questions as he wished. He availed himself of that purpose. The only witness who knew anything about them was then on the stand. Counsel knew he was going to leave. He has since left the Territory and cannot be recalled. For the further reason that counsel objected to the income tax returns when they were offered by us when the witness was here to explain

them. They were ruled out on counsel's objection. While one was admitted before the ruling was made they were withdrawn by us on the understanding that the court had ruled against them." (P. R. P. 856).

No offer of proof was made by appellant and the purpose for which the exhibits were offered was not stated.

This objection was sustained by the Court.

The bundle marked for identification as Exhibit 53, was offered in evidence as one Exhibit, and to the offer so made the following objection was interposed:

"Object to this offer for the reason it is irrelevant, incompetent and immaterial—the further reason that it is not a record and can be used for no other purpose in the case except for the purpose of impeachment; that the offer was submitted to counsel for that purpose, so that he might cross-examine Mr. Tuckett, who made the income tax report, while he was on the stand and was then here, and used for that purpose and Mr. Tuckett admitted on questions asked of him concerning it and afterwards explained the situation, so that there was nothing to impeach him on, and for the further reason that the Witness Tuckett has since left the Territory and since explanation cannot be made now; counsel being advised at that time Mr. Tuckett was about to leave, and further reason counsel for the defendant offered the income tax returns in evidence

while the Witness Tuckett was here and on the stand so that he might explain them, whereupon counsel for the plaintiff objected to them and the objection was then by the court sustained, so he is now estopped from claiming anything under these income tax returns whatever; the further reason they are incompetent, irrelevant and immaterial; and it is not proper rebuttal. (P. R. PP. 885-886).

Appellant did not make an offer of proof or state the purpose for which the exhibit was offered.

This objection was sustained by the Court.

The Bill of Exceptions contains the following statement:

"Be it further remembered, that when the copy of defendant's income tax reports, attached to and embodied in the offer marked for identification as plaintiff's exhibit No. 43, and the copy of defendant's income tax report embodied and attached to the offer marked for identification as plaintiff's exhibit No. 44, and the copy of defendant's income tax report attached to and embodied in the offer marked for identification as plaintiff's exhibit No. 53, were offered in evidence by the defendant while the witness Tuckett was on the stand, it was understood by Court and Counsel on both sides that the witness Tuckett was about to leave the Territory for Portland, Oregon.

And be it further remembered, that when the plaintiff offered in evidence what is marked as plaintiff's exhibits Nos. 43, 44, and 53, it was known to Court and Counsel on both sides that the witness Tuckett had departed from the Territory of Alaska." (Pr. R. P. 886).

The first point that presents itself is this: Each of the bundles of papers marked for identification as Nos. 43, 44 and 53, respectively, contain not only purported copies of defendant's income tax returns, but also other papers. In all cases the proposed exhibits contain one or more letters from officials of the Internal Revenue Bureau, addressed to Gross; and in one or more cases there are also statements, reports, etc., made out by officials or agents of the Internal Revenue Department. Clearly, these letters, statements, and reports, were not competent evidence against Gross, yet they are attached to and form part of the exhibit as offered, so that they make the whole Exhibit inadmissable. It is not the duty of the Court to go through a bundle of papers offered as one exhibit and to select from it such portions as may be competent and reject others. If one portion of an exhibit as offered is incompetent or immaterial, the whole exhibit as offered becomes inadmissable. This applies to each of the three proposed exhibits. Included in each exhibit also are purported copies of income tax returns. No showing is made as to why the originals were not produced. While the objection, as made, does not spec-

ifically include the ground that the copies offered were not the best evidence, the incompetency was stated as one of the grounds of objection.

Turning now to the question of whether these income tax returns would be admissable under the circumstances in the case if they had been offered as separate exhibits, without being attached to other incompetent and immaterial papers, and without regard to the question of whether copies would be admissable, we submit the following:

Demand was made for the income tax returns under the Statute and they were produced. Then, while the witness Tuckett was on the stand the following proceedings were had:

(Testimony of Charles M. Tuckett).

Thereupon witness Tuckett testified: Defendant's Exhibit M for identification is defendant's income tax return for 1929.

Whereupon the following proceedings took place:

MR. HELLENTHAL: I offer that in evidence.

MR. ROBERTSON: Same general objection, if the Court please.

THE COURT: It may be received.

MR. ROBERTSON: Exception.

THE COURT: You called for it yourself.

MR. ROBERTSON: We wanted to inspect it, is all.

Q. Calling your attention to Defendant's exhibit "M", that is Mr. Gross' income tax report for 1929?

A. Yes.

Q. Does that show the same profits and losses you show in your tabulation for 1929?

A. I can't say exactly whether it shows the same or not.

Q. It is calculated exactly the same way?

A. Yes sir.

Q. Did you prepare them?

A. Yes, sir.

Q. You are familiar with them?

A. Yes.

Q. State whether that can be checked down to show the same system for Ketchikan your tabulation and reports show.

A. Yes.

Q. Have the same methods been applied to that as to your report?

A. Yes sir.

Q. With reference to the films, for instance, do they show in there as expenses of the Coliseum theatre in Ketchikan and Juneau or in Ketchikan with the Alaska Film Exchange?

A. Alaska Film Exchange.

Q. Alaska Film Exchange is also calculated in that?

A. Yes sir.

Q. And what other theatres?

A. That is all in this one—the two theatres Juneau and Ketchikan and the Alaska Film Exchange.

Q. There were no other theatres at that time?

A. Not that Mr. Gross controlled.

Q. That is the only income tax report you made during 1929?

A. Yes.

Q. And that shows the situation as it is shown in your reports?

A. Yes sir.

THE COURT: Does that include other incomes except from these two theatres?

A. Yes.

Q. (THE COURT) Is it separated in such a way that it will be intelligible?

A. The incomes do, but the expenditures is other than could be applied to the two theatres. It shows expenditures all over the circuit in different places.

Q. Show the expenditures over all the various circuits?

A. Well, it shows he has got receipts on that income from what he received from the apartments, and as we explained in the Juneau part of the salaries the full salaries included in that report are for only half charged to the Coliseum theatre?

Q. It shows here all charged to the Coliseum theatre?

A. It is all charged in the report we made, blanket report of salaries and expenditures and substracted from the amount of money he received.

Q. How about the small theatres?

A. He was getting returns from some of them.

Q. Does that show in here?

A. Yes.

Q. Under a separate head?

A. I will have to look and see—yes—this shows the total rent from the apartment and stores included in that item there.

Q. That doesn't show the expenses of the Coliseum by itself?

A. No sir.

Q. Nor the expenses of the Coliseum in Ketchikan by itself?

A. No sir.

Q. It would require quite a little bookkeeping to arrive at your exact figures the way you have it segregated?

A. Yes, that is why we made the work sheets.

Q. But the ultimate result—is that the same?

A. Yes.

Q. That is, the profits shown were so much from Juneau or so much from Ketchikan, is that the same as the profit arrived at by you?

A. No.

Q. Why isn't it?

A. Because that was taken in blanket form.

Q. You took in more expenses, they wouldn't belong to the Coliseum theatre?

A. Yes.

Q. Either at Juneau or Ketchikan?

A. Yes.

Q. So your profits would be somewhat larger than these?

A. Yes.

Q. That is due to the fact that you, as you say, took in other expenses in the Gross apartments, bills and things of that kind?

A. Yes.

Q. But are not charged in your report because they didn't belong to the theatre, is that true?

A. Yes sir.

Q. I hand you here a paper marked'M-1'. Look at it and state what that is.

A. Income tax return for the year 1930, covering all of Mr. Gross' business.

Q. Covering all the Gross theatres in operation, of every kind?

A. Yes sir.

Q. What does that include?

A. All Mr. Gross' holdings.

Q. All of Mr. Gross' holdings. Did you prepare this?

A. Yes sir.

MR. HELLENTHAL: I offer that in evidence.

MR. ROBERTSON: We make the same general objections, if the Court please.

THE COURT: I think these both ought to be denied, at least for the time being. It is more confusing than anything else.

MR. HELLENTHAL: The Court rules out the previous one also?

THE COURT: Yes.

MR. HELLENTHAL: Let it be understood the previous exhibit is not in evidence, and this is also denied. And the court will make the same ruling on the income tax for 1931?

THE COURT: Yes.

MR. HELLENTHAL: We offer that and it may be ruled out; withdraw the previous offer, Your Honor.

THE COURT: Very well.

MR. HELLENTHAL: Withdraw both for 1929 and 1930 also."

(P R. PP. 667, 668, 669, 670, 671).

Later in the proceedings and while the witness Tuckett was still on the stand, and the income tax returns were being inquired about, and the witness had been asked about this or that figure, and he, having testified on page 731 that he couldn't answer these questions in relation to figures in the Income Tax Returns without an explanation of the Income Tax Returns, counsel for appellee made the following statement:

"We have no objection to counsel asking about these income tax reports, provided the witness be permitted to do what I tried to get him to do. I offered these in evidence. Counsel objected, and the Court sustained the objection, but counsel having objected and they being excluded, I now insist they be placed in evidence and the witness be permitted to explain the whole thing—all put before the jury and the witness given a chance to explain them." (P. R. P. 732).

This statement gave counsel an opportunity to agree to the admission of these income tax reports if

he desired to inquire further about them. This was not a statement under which counsel for appellee agreed that the Income Tax reports might be offered in evidence at any time, but that they might then be received in order that they might be fully explained by the witness Tuckett who had made them. Had counsel for appellant then consented to their introduction there would have been no question about it—but he failed to do this. The witness Tuckett was then on the stand and it was understood by both Court and Counsel that he was about to leave the Territory. (See Bill of Exceptions, P. R. P. 886).

Later, after the witness Tuckett had left the Territory (See Bill of Exceptions, P. R. P. 886) and when that fact was known to both Court and Counsel, the Income Tax returns were offered in evidence, not by appellee but by appellant. The appellee's counsel then objected to the offer as made on the following ground:

"Object to them as irrelevant, incompetent and immaterial. They have been properly submitted to counsel for the purpose of interrogating a witness on such questions as he wished. He availed himself of that purpose. The only witness who knew anything about them was then on the stand. Counsel knew he was going to leave. He has since left the Territory and cannot be recalled. For the further reason that counsel objected to the income tax returns when they were of-

fered by us when the witness was here to explain them. They were ruled out on counsel's objection. While one was admitted before the ruling was made they were withdrawn by us on the understanding that the court had ruled against them." (P. R. P. 856).

The foregoing offer only included two of the income tax returns; the third was offered later, and the proceedings relating thereto appear on page 885 of the printed Record. The offer as made was objected to on the following grounds:

"Object to this offer for the reason it is irrelevant, incompetent and immaterial—the further reason that it is not a record and can be used for no other purpose in the case except for the purpose of impeachment; that the offer was submitted to counsel for that purpose, so that he might cross-examine Mr. Tuckett, who made the income tax report, while he was on the stand and was then here, and used for that purpose and Mr. Tuckett admitted on questions asked of him concerning it and afterwards explained the situation, so that there was nothing to impeach him on, and for the further reason that the Witness Tuckett has since left the Territory and since explanation cannot be made now counsel being advised at that time Mr. Tuckett was about to leave, and further reason counsel for the defendant offered the income tax returns in evidence while the witness Tuckett was here and on the stand so that he might explain them, whereupon counsel

for the plaintiff objected to them and the objection was then by the court sustained, so he is now estopped from claiming anything under these income tax returns whatever; the further reason they are incompetent, irrelevant and immaterial; and it is not proper rebuttal."

(P. R. P. 885-886).

The objection was in each case sustained.

In neither case did appellant make an offer of proof or state the purpose for which the papers were offered. It was its duty to do this in order that the court might be informed. Having failed to inform the court, appellant cannot now complain about the ruling made by the court.

It cannot be conceded that when a man makes an income tax return he is bound by the statements therein contained in other proceedings. The income tax returns are made out for a definite purpose, and so long as they accomplish that purpose it is immaterial whether the segregation between different lines of activity are properly made or not. In this case the income tax returns included all of Mr. Gross' various lines of business. The object was to show the net income from these combined enterprises without regard to how much each of the separate enterprises contributed to it. To illustrate: In the income tax returns all the film rentals were charged to the Ketchikan theatre. This made no difference in the income tax re-

turn, because it didn't affect the general result. The tax was not computed on the profits from the Ketchikan theatre but on the profits of all the various enterprises conducted by Gross. (P. R. P. 758).

However, in determining the profits of the Ketchikan theatre as a separate institution, it would, of course, be improper to charge that theatre with more than its proportion of the film rental, in view of the fact that these films were used at first in two and later in a considerable number of theatres. By lumping all of these various businesses in one income tax report, similar situations would no doubt arise with reference to other matters. While the witness Tuckett was here he was able to explain matters of this kind, which, without explanation would appear as discrepencies; and it may be added that without such explanations the income tax returns could lead to nothing but confusion.

Then, also, it may be added that most persons when making out an income tax return make their income as small as they think they possibly can under the law. It may be that they shouldn't do this, but they do it, and this opens up another field where explanation may often be required.

The appellee offered these income tax returns while the witness Tuckett was in Juneau, so that he could explain them. Appellant objected to their introduction. The specific grounds of objection were not

stated, but the appellant did object, and it is immaterial what the grounds of objection were so long as the Court ruled with appellant. In making the objection as it occurs on page 667, counsel for appellant used this language:

"Same general objection, if the court please."

Referring back to page 654 of the printed record, where the preceding objection occurs, it is stated in this language:

"Object to all this line of testimony as incompetent, irrelevant and immaterial; it doesn't go to the true measure of damages." (P. R. P. 654).

In any event, the income tax returns were ruled out by the Court on the objection of the appellant at a time when the witness Tuckett, who made up the income tax returns and was the only person qualified to explain them, was available and in Court so that he could make the necessary explanations and make the income tax returns themselves intelligible; and at that time Court and Counsel on both sides knew that the witness Tuckett was about to leave the Territory. Then later, when the witness Tuckett had left and when Court and Counsel knew that he had left so that he could not be recalled to make an explanation of the apparent discrepencies and make the returns intelligible, they were offered by appellant. Now, independent of these considerations, it is a general rule

of law that when a party at the trial objects to the introduction of certain evidence and induces the Court to exclude the evidence on his objection, he cannot afterwards offer the same evidence, and complain if the Court adheres to its former ruling made at his instance, and again rules out the testimony offered. While it is true that the Court can change its ruling upon any point at any time during the trial, a ruling made at the request of a party becomes the law of the case so far as that party is concerned, and he will not be heard to complain if the Court afterwards adheres to this ruling.

This point has often been decided by the Courts. In the case of Trott vs. Chicago R. I. & P. Ry., 87 N.W. P. 722 (Sup. Ct. of Iowa), it was held that:

"Where defendant's objection to certain evidence on the ground of irrelevancy was sustained, it was not entitled to object to the exclusion of evidence on the same subject subsequently offered in its own behalf."

In Crawford vs. Wolf, 29 Iowa 567, it was held that:

"A party cannot complain of the admission of evidence under a rule adopted by the court, claimed to be erroneous, when such rule was adopted at the instance or upon the suggestion of the party complaining." The same is true of rulings rejecting evidence. If it was immaterial as claimed by defendant in its

objection to the question put to the plaintiff on his direct examination, it was surely immaterial as to questions put to the witness Biddings. Defendant, having invited the ruling that the condition of the guard-rails at other stations then at Muscatine was immaterial, may not complain of the application of the same rule to its offer of proof. In view of this state of the record, we think appellant is in no condition to question the ruling complained of."

The case of Commonwealth vs. Fitzgerald, 123 Mass. P. 408, (Sup. Ct. of Mass.) was a trial of defendant on an indictment for an assault with intent to ravish. The person assaulted testified that the defendant assaulted her; that she knew where he lived; and that during the same week she made complaint to the officer who made the arrest. The government offered evidence of what she told the officer at that time, which, upon the defendant's objection, was excluded. The defendant, for the purpose of showing that she did not tell the officer that he was the man who assaulted her, offered to prove that, up to the time of his arrest, he was generally at his home, and that no effort was made to arrest him until a week after the alleged assault. The defendant, still objecting to the evidence offered by the government which had been excluded, the judge declined to admit the evidence offered by the defendant.

The Supreme Court held that defendant had no ground of exception.

The case of Swift vs. Union Mutual Marine Insurance Co., 122 Mass. P. 573, was an action on a policy of marine insurance. The Supreme Court of Massachusetts said:

"The examination of the witness called by the plaintiff to prove the condition of the ship, as to soundness and strength when she sailed from New Bedford was objected to by the defendant, and was waived by the plaintiff, at the suggestion of the court; the defendant having admitted her seaworthiness. After that the court properly refused in that stage and aspect of the case to allow the defendant to cross-examine the witness and put in evidence on that subject matter."

The case of Fischer vs. Franke, 47 N.Y. Supp. P. 161, was an action for damages for personal injuries. There was a judgment for plaintiff; and defendant appealed to the Appellate Division of the Supreme Court, which said:

"The only ruling assailed, exclusive of those relating to the charge, is the refusal of the court to permit evidence as to whether any complaint had been filed with the department of public works in regard to anything concerning the bridge, or the said premises in course of construction. We think this ruling was right, and for two reasons: If the plaintiff had sought to recover upon the ground of a nuisance, such testimony might have in some way been relevant, but where the action was predicated upon the negligence of the

defendant in constructing and maintaining, for an unreasonable time, a bridge which was defective, and which was used by the public as a substitute for the sidewalk, this, if proven, could in no way be affected by the question whether complaints were or were not filed with the department of public works. The second reason lies in the fact that similar evidence was sought to be introduced by the plaintiff in questions put to one of the policemen as to whether he had ever made a report to the public authorities of the unsafe condition of the bridge; and under the defendant's objections such evidence was excluded. While it is true that the objection was to the form of plaintiff's question, there is little reason to doubt, with respect to one of the questions at least, that the court's ruling was based upon the theory, not only that the question was erroneous in form, but that the evidence sought to be adduced was irrelevant and incompetent. *Having successfully got the court to take this position, we do not think that when the defendant sought to introduce similar evidence, he can, with good grace, urge that it was error on the part of the court to apply the same rule.*"

In the case of Best vs. Wohlford, 94 Pac. P. 98, the Supreme Court of California held that:

"Where the trial court had refused to admit any evidence by defendant in support of a tax title, (on plaintiff's objection), it was error to allow plaintiff to introduce evidence in rebuttal to show that the tax

deed was invalid because of defects in the proceedings."

In the case of Seininski vs. Wilmington Leather Co., 83 Atl. P. 20, (Sup. Ct. of Delaware), for personal injuries caused by defective machine, one of plaintiff's witnesses was asked "whether the machine, on the day of the accident, was a dangerous machine." To this question the defendant objected, and the objection was sustained .

Defendant, later in the trial, asked one of its witnesses "whether there was any hidden or obscure danger of any kind about this machine." This question was objected to by the plaintiff upon the ground that plaintiff had not been permitted to introduce testimony along similar lines. The objection to defendant's question was sustained. A verdict for plaintiff was approved.

In the case of Curtiss vs. Jebb, 96 N.E. P. 120, judgment was for plaintiff, and defendant appealed. The court of appeals of New York said:

"Upon this appeal there are only two questions that survive the unanimous affirmance by the Appellate Division. One relates to the exclusion of certain testimony offered by defendant, and the other arises upon the form of judgment entered in favor of plaintiff. As to the first of these questions, we have only to say that, since the trial court, upon defendant's ob-

jection, had previously excluded similar evidence offered by plaintiff, the ruling excepted to by defendant was clearly right."

CONCLUSION.

This is not a case where it is assigned as error that the verdict is not sustained by sufficient evidence, or that the verdict is excessive. Indeed, the record shows that the verdict might have been for a much larger amount without being open to either of these objections.

It is important to note at this point that nearly all of the exceptions brought up for review are general in their nature and state no ground of exception at all, and that in those cases where there is an attempt to state ground of exception, the grounds are stated in such general and uncertain terms that they present nothing for consideration, for the reason that they do not sharply and specifically call the trial court's attention to the error, if any, so that it might be corrected. Indeed, some matters, as we have pointed out, that were discussed by counsel under his six points in appellant's Brief, relate to things that were not excepted to at all.

The assignments of error all relate to technical erorrs supposed to have been made by the Court. The various exceptions have been discussed, and it has been pointed out that none is well taken, but it should be added that most of the alleged errors presented are such

that they would be harmless even though they were well-founded under the facts and circumstances in the case.

The right of the appellant to recover depended upon the question of whether it had a right to collect service charges from the appellee; and the question of whether appellant had the right to collect these service charges depended upon two things; First—Did the appellee agree to pay them? and second—Did the appellant render the service? Most of the exceptions reserved by the appellant relate to the question of whether the appellee agreed to pay service charges. Obviously, these exceptions cannot avail appellant anything if it didn't render the service.

Now, upon this question of whether it rendered the service, the evidence is all one way. Service, according to the admission of the Vice President of the appellant corporation, consists, among other things, in keeping a service man within call all the time so that if anything went wrong with the equipment all the Exhibitor had to do was to call for a service man to repair the equipment right away, and put it in running order. Now, there is not a scintilla of testimony tending to show that the appellant ever made the slightest attempt to render "service" as defined by its own Vice President. There was not a moment throughout the entire period preceding the commencement of this action, or at any other time for that matter, when ap-

pellant kept a service man on call at either Juneau or Ketchikan. In this connection it must be remembered that to keep a service man on call would not mean to keep a man in the Antarctic regions or some other remote place but to keep a man where he could be reached at any moment and from where he could come and service the equipment right away, without delay, so as to keep the show going. The most that appellant ever pretends to have done is to send a service man to Juneau and to Ketchikan periodically, whose business it was to inspect the equipment and to sell merchandise. These visits were made approximately once a month, not oftener than it would be required to send a salesman with a view of keeping the Exhibitors supplied with such articles of merchandise as appellant had to sell. It is not even pretended by appellant that any of these service men ever made any repairs to the equipment of Gross. The evidence is that the equipment was often out of repair and that the employees of Gross put it back into repair on each occasion; that at no time when there was a breakdown was one of appellant's service men to be had. Of course, they could have shut the show down and waited from a week to probably a month to get one of appellant's service men, but no theatre could be operated under those conditions, and that is not what is contemplated when we speak of rendering service. Mr. Wilcox says: "The service man is on call and comes right away." Upon this point there is no dis-

pute in the evidence. As a matter of law, therefore, no service was ever rendered by the appellant. If, as a matter of law, no service was ever rendered, then it follows as a matter of law that appellant had no right to collect for it, and it becomes entirely immaterial whether the appellee had ever agreed to pay for service or not.

Coming now to the other branch of the case which deals with the question of whether appellee had a right to recover under its counter-claims, the first question presented is whether appellee could recover the rental value of the equipment for the unexpired period of the lease between him and appellant. The undisputed evidence is that appellee had paid appellant something like Twenty One Thousand Dollars, in advance, for the use of the equipment during a period of ten years. While this amount had been paid in installments, the entire sum had been paid before the equipment was taken out under the writ of replevin. If the appellant had never rendered the service contemplated then it follows that it had no right to remove the equipment, and if not, the appellee certainly had a right to recover from it the money previously paid as rent for the equipment during the unexpired term. This is especially true since appellant admits in the complaint that the rental value of the equipment during that portion of the term is equal to the amount paid. In respect to none of these matters is there any dispute in the evi-

dence, so that appellee has a right to recover as a matter of law .

The next item that presents itself for consideration is the appellant's right to recover lost or anticipated profits. Upon this question also the evidence is uncontradicted, and the facts are established as a matter of law. No one denies that appellee had a going established and profitable business at the time the equipment was taken out. No one can deny that the taking out of the equipment would interrupt that business, and that there would be loss of profits, so that the only question remaining is the question of how much these lost profits amounted to. Upon this question, also, the evidence is uncontradicted. Appellee produced witnesses to show in dollars and cents just how much these profits amounted to, and not a single witness was called who contradicted the tesimony of these witnesses. True, Mr. Cooper found some mistakes in the additions, but upon re-checking the additions, appellee's witnesses found that Cooper's additions were correct, and the necessary corrections were made so as to accord with Cooper's calculations. This leaves the evidence where there was perfect agreement between the witnesses on both sides. True, Cooper made some calculations of what might have happened if the facts he assumed to be true were true; but these calculations were all based upon assumptions that were not established as facts in the case, and they do not in the slightest degree lead to any contradiction of the

evidence furnished by appellee upon the subject of lost profits. The jury's verdict in the case was for an amount much less than the amount to which appellee was entitled under the undisputed evidence. It must follow, as a matter of law, that appellee was entitled to recover at least as much for lost profits as he was awarded by the jury.

This only leaves a single item of damages to account for, and that is the question of whether appellee was entitled to recover monies expended in the attempt to reduce damages. Upon this point also the evidence is uncontradicted; it shows that appellee bought the best equipment available at that time to install in the place of the equipment that had been removed. The uncontradicted evidence shows that while this equipment was the best that could be had, it was nevertheless inferior equipment; that the sound was bad, and that as a result attendance became less and profits became smaller. The price paid for the equipment was shown in the evidence and was not contradicted. When the theatres were finally leased to Shearer this equipment had become entirely worthless, had no value either in the market or elsewhere, could not even be used for junk; and on this question also the evidence is all one way without contradiction. As a matter of law, therefore, the appellee had a right to recover for monies expended in this behalf.

Coming now to the question of whether the appellee had a right to recover the monies paid by him under duress, which is the only remaining item ,the evidence is all one way. The witnesses Gross and Cawthorne testified to the high pressure methods employed by the appellant in order to coerce the appellee and compel him to pay the monies sought to be recovered. And the witness Gage, produced by appellant, admits the essential features of this testimony. He admits that he told appellee that unless he paid the sums demanded he would not be permitted to continue the use of the equipment, and that he illustrated his statement by telling him about the way in which telephones were taken from the wall unless the telephone were paid for. This was the essential thing, for if the equipment were taken out it would follow that the business of Gross would be interrupted if not completely destroyed. Sound equipment cannot be taken out of a sound producing theatre without putting an end to the theatre's business, and the evidence of Gross is—and it is not contradicted—that at that time no other equipment could be had to take the place of the equipment if it were taken out. Under these circumstances, Gross had a right to recover the amounts paid, as a matter of law, and since there is no dispute about the amounts paid, he would have a right to recover the amount he did recover. From the foregoing it would follow that any exceptions reserved in connection with those

matters that relate to appellee's right to recover would become harmless and immaterial, for what the appellee had a right to recover under the uncontradicted evidence, he had a right to recover as a matter of law.

Then, too, the equities in the case are all in favor of the appellee. The high pressure methods employed by appellant may have been modern but they were not such as to raise any equities in its favor. From the first appellant coerced appellee by holding over his head the threat to remove the equipment. An action was brought to recover the service charges that form the basis of the present action and the appellee's box office's were attached. When appellee put up a bond to release the attachment he was again met with a threat that unless he paid the equipment would be disconnected. He asked that the question be tried out in court in the attachment suit—but no, proceedings were commenced to replevin the equipment. Again appellee begged for time to put up a bond, but the equipment was dismantled so that it could not be reassembled by appellee, so as to make a re-delivery bond useless. Appellee installed the newly acquired equipment, did his utmost to reduce the damages, set up his counterclaims, and offered the best proof possible under the circumstances of the damages sustained. Appellee's only defense is an attempted justification of the meth-

ods employed by it. The equities, as well as the law, are all one way, and we think they are such as to call for an affirmance of the judgment by the Court.

Respectfully submitted,

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H. L. FAULKNER,

Attorneys for Appellee.

NO. 8044.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRICAL RESEARCH PRODUCTS, INC., a corporation,

Appellant,

vs.

W. D. GROSS,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA, FIRST DIVISION.

BRIEF FOR APPELLEE

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SUBJECT INDEX

STATEMENT OF FACTS

(Page 1)

(With Special Reference to Facts Claimed by Appellant to be Admitted.)

POINT I.

(Page 2)

POINT III.

POINT IV.

POINT V.

POINT VI.

INDEX OF AUTHORITIES AND STATUTES CITED

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STATEMENT OF FACTS

The facts were fairly well discussed upon the oral argument and are set out quite fully in the original Brief, commencing on page 1. Then, too, it will be necessary to refer to the facts, to some extent, in connection with the points discussed in appellant's brief—this makes it unnecessary to refer to the facts at this time except to say that we cannot agree that the facts

listed by counsel on page 3 et seq. of his brief are in fact undisputed facts. Many of them are not only disputed, but wholly disproven by the evidence.

POINT I.

The appellant maintains, under this caption, that the Court erred in instructing the jury as follows:

> "And in this connection, I further instruct you that if you believe from the evidence that at the execution of these alleged contracts (of September 4, 1929) the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services."

The exception taken to this instruction is in the following language:

> "We take an exception to instruction No. 2 * * *. We take an exception to that part of the Court's instructions commencing with line 20 on page 13 (Par. 8) * * *. (Pr. Rec. PP. 129-130; Pr. Rec. P. 1024).

It will be noted that the grounds of the exception are not stated, so that the exception presents nothing for review, either under Rule 10 of this Court or under the general law upon the subject.

In the case of *United States vs. United States Fidelity Co.* 236 U. S. 512; 35 Sup. Ct. R. 298-303, Mr. Justice Pitney, speaking for the Supreme Court say:

> "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court."

The exact point has been passed upon by this court in a number of cases. Thus in the case of *Sacramento Suburban Fruit Co. vs. Johnson* et. al., 36 Fed. 2nd. 925, it is said:

> "There are five specifications of error based upon exceptions to the instructions given, but these exceptions are insufficient, because in no case was the ground of the exception stated."

In *Howard vs. Beck*, 56 Fed. 2nd. 35, the effect of Rule 10 and the authorities bearing on this rule are considered and reviewed.

In the case of *State Life Ins. Co. vs. Sullivan*, 58 Fed. 2nd., 741-744, the exact point was again before this court. In that case it is said:

> "Appellant objects to two paragraphs of the charge given by the court to the jury. These exceptions do not state the ground of the objection, and are clearly insufficient to justify our consideration."

But there is nothing wrong with the instruction. The language objected to must be read in connection with what preceeds and follows it. The whole instruction so far as pertinent reads:

> "The defendant also claims that the alleged contracts of September 4, 1929, have no effect upon the defendant Gross, because they were executed without consideration.
>
> "In this connection I instruct you that when a party promises to do what he is already legally bound to do, or does what he is already legally bound to do, neither promise nor act is a valid consideration for another promise.
>
> "And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services; or if you believe from the evidence that the 'service' referred to in the alleged contracts of September 4, 1929, is something different or in addition to the 'inspection and minor adjustment service' referred to in the contracts of March 28, 1929, the plaintiff cannot recover therefor unless he has performed such service; and in this connection I instruct you further that there is evidence before you upon the question of what is meant by the term 'service,' when used in connection with the sale and use of motion picture sound equipment when used by those engaged in the business of supplying and dealing in motion picture sound equipment; and that if you find that this term 'service' has a meaning

when used by persons so engaged, other and different from its ordinary meaning, you must apply that meaning to the term as used in said supplemental contract of September 4, 1929. The question of what is meant by the term when so used by persons so engaged, is a question of fact for the jury, and if the term when so used means something other and different from the 'inspection and minor adjustment service' hereinbefore referred to, then there was and is a consideration for the alleged contracts of September 4, 1929, and plaintiff would be entitled to recover therefor if it performed such 'service,' but would not be entitled to recover therefor unless it did perform and furnish such service, provided, of course, you find that the 'service' mentioned in the supplemental contracts of September 4, 1929, was not the same 'service' provided for in Paragraph 4 of the contracts of March 28, 1929." (Pr. Rec. PP. 994-995)

That the supplemental contracts of September 4 required a consideration to support them cannot be doubted. In volume six of Ruling Case Law at page 917—Contracts, Par. 301—it is said:

> "A valid consideration is an essential and indispensable element in every binding agreement. If a written contract is altered by agreement, such agreement must have the essential ingredients of a binding contract; and although it may have reference to, and indeed embody, the terms of the written contract, yet is must be founded on a new and distinct consideration of itself."

This is especially true of a contract such as the contracts P. Exhibits 1 and 3, which contain no pro-

vision relating to their amendment or modification at a later date, but which do contain a provision to the contrary. Paragraph 20, hereinafter quoted, provides that the contract contains the entire understanding, and that there is no agreement, express or implied, relating to the contract. (P. Rec. 168)

Since a consideration was necessary, it requires no citation of authorities to show that the Court was right in instructing the jury that "when a man does what he is already legally bound to do, his act is no consideration for a promise."—this is fundamental.

In the course of the discussion counsel for appellant, on page 18 of his brief, says:

> "The only explanation of this extraordinary ruling of the Court's is found in its subsequent instruction to the jury as follows: 'And in this connection, I instruct you that said agreement (of March 28, 1929) or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment'."

In his brief counsel merely refers to his instruction with the apparent view of seeking an explanation for the Court's action in giving the instruction previously referred to, but upon the oral argument the last mentioned instruction was discussed to a considerable extent.

The objection taken to this instruction reads as follows:

> "Take exception to instruction number 7, particularly that part of it commencing at line 15, page 23, (2nd. Par.) as not being a true statement as to the effect of the contracts, exhibits 1 and 3 of March 28, 1929, and is not a statement in accord with either the law governing the contracts of March 28, 1929, or the facts produced in evidence as shown by the contract itself. We take the position there that throughout the case the omission of the amount in paragraph 6 does not make the service free." (Pr. Rec. P. 1024)

The exception as stated does not call the court's attention to any specific error of law; it does not point out any part of the contract referred to under which the contract required the defendant Gross to pay plaintiff for periodical inspection and minor adjustment service. In other words, it does not call the court's attention to the respect in which the court erred. All the objection amounts to is that the omission of the amount, in paragraph 6, does not make the service referred to in that paragraph free; but it is not pointed out where in the contract there is a provision that periodical inspection and minor adjustment service must be paid for. The exception taken would in no way aid the court in reaching the correct conclusion if there were anything wrong with the conclusion that the court had reached.

In the case of *Allison vs. Standard Air Lines*, 65 Fed. 2nd. 668, where this court had before it an exception that was uncertain in its terms, it is said:

> "These purported exceptions are not clear. They fall far short of that degree of succinctness and particularity that the courts have exacted of exceptions to instructions, on the ground that the lower court should be given a fair chance to correct any alleged errors in its instructions before the case is submitted to the jury.
>
> "We have studied these two purported exceptions very carefully, and we are convinced that they are fatally ambiguous, equivocal, and indefinite. Nowhere is there a specific statement of the error alleged to have been committed by the court."

In the case of *Davis vs. North Coast Transportation Co.* 295 Pac. 921, the Supreme Court of Washington had before it an exception reading as follows:

> "Defendants except to instruction number three for the reason that the same is not a statement of the law applicable to the case and not justified or warranted by the facts."

It will be noted that this exception was in some respects at least like the exception now being considered. In passing upon the sufficiency of the exception, it is said:

> "This exception in no way called the court's attention to the fact that in the instruction there was an incorrect statement of the law in that it was said that contributory negligence, in order to defeat a recovery, must have been the proximate cause of the injury. In *Kelly vs. Cohen*, 152 Wash. 1, 277 Pac. 74, 75, it was held that an exception to an instruction in this language, 'Defendant ex-

> cepts to instruction No. 5, upon the ground and for the reason the same is not a correct statement of the law, and not based upon the evidence in this case,' was too general and was not a compliance with the rule requiring instructions to be sufficiently specific to apprise the judge of the points of law or questions of fact in dispute."

To the same effect is the later case of *Parton vs. Barr*, 24 Pac. 2nd 1070.

The only portion of the exception taken that calls the Court's attention to anything at all, reads as follows:

> "We take the position there that throughout the case the omission of the amount in paragraph 6 does not make the service free."

No one contends that the omission of the amounts in paragraph 6 made the service, referred to in that paragraph, free; and the Court did not so instruct. The contention upon this point is simply this: that the omission of the amounts in paragraph 6 rendered the entire paragraph inoperative, so that the appellant was not required to render the service referred to in that paragraph and the appellee was not required to pay for it. But the Court's instruction does not in any way refer to "service" as that term is employed in paragraph 6.

Paragraph 4 of each of these contracts contains this provision: "Products also agrees to make periodi-

cal inspection and minor adjustments in the equipment after it shall have been installed."

Paragraph 6 relates to the payment of a weekly service charge—the blanks in this paragraph were not filled in. It is quoted correctly on pages 19 and 20 of appellant's brief.

Counsel in his brief, however, makes no reference to two other significant provisions in the contracts. Paragraph 8 of each of the contracts contains this provision: "The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connecting with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for." (Pr. Rec. P. 178) The closing words of this paragraph, "except for the regular periodical inspection and minor adjustment service hereinbefore provided for," are not discussed or referred to by appellant's counsel in his brief at all; in his brief, appellant's counsel deals with the contracts as though they did not contain this provision. Counsel simply takes the position that "periodical inspection and minor adjustment," as this phrase is used in paragraph 4 is synonymous with the term "service," as this term is employed in paragraph 6. He then assumes that paragraph 6 provides that the "service," whatever it is, is to be paid for at whatever schedule appellant may from time to time adopt, and that the ef-

fect of leaving the blanks in paragraph 6 is simply to take away the limit on what appellant may charge from time to time, so that under paragraph 6 appellee is obliged to pay whatever appellant may from time to time demand. Counsel for appellant then proceeds to ignore the provisions of paragraph 8, which provide that the inspection and minor adjustment service is not to be paid for at all.

Now, in considering the meaning of this contract, we are met with the difficulty that neither the phrase "periodical inspection and minor adjustments," nor the phrase "service and inspection" is defined or explained—there would be no way to decree specific performance of the provisions of the contract in which these terms occur. This is not a suit for specific performance, but a forfeiture is asked for, and the right to the forfeiture depends upon the meaning of these terms. The point is that the Court would not permit a forfeiture on account of the failure to pay money for something that is described in such uncertain terms that the court could not compel its specific performance—there would be no way for the court to tell whether the party asking for the forfeiture had done what he should have done to entitle him to the money the failure to pay which lay at the basis of the right to a forfeiture claimed by him. Before the appellee's right of possession can be forfeited or terminated under these contracts, the reluctance of the Courts to permit a forfeiture must be overcome by an explicit

showing that the right to a forfeiture exists; this requires something more than a showing based upon words of such doubtful and uncertain meaning as those employed in this agreement.

But the evidence shows, that to those engaged in the motion picture business, these terms have a definite meaning, and that the making of minor adjustments is one thing, and the rendition of service quite another thing; that to make minor adjustments merely means, as the term implies, to adjust the parts of equipment that is in a good state of repair—a thing that can be done periodically and occasionally; but that to "service" the equipment, as that term is employed in paragraph 6, is to keep the equipment in repair, and not only to put it into repair when it is out of repair, but to keep a competent person within reach and on call at all times so that the theatre-operator can reach him at any moment and get him to put the equipment back into repair when something goes wrong with it. This "service" is rendered immediately and at all times. (Ev. Cawthorn, Pr. Rec. PP. 473-474-475; Ev. Clayton, Pr. Rec. PP. 783- 784.)

The evidence upon this point is not only uncontradicted; but while Mr. Wilcox, the Vice-President of appellant, testified as a witness and gave a rather involved definition of "service," he does not deny that this distinction between the meaning of the term "service" and "minor adjustments" exists. Referring to

the question of what "service" consists of, Mr. Wilcox says in part: "Plaintiff also furnished a service man day or night on call whenever the theatre was running; the operator had nothing to do if anything was wrong except to call the office and get a service man right away." (Pr. Rec. P. 292) In the face of this solemn admission, by the Vice-President of appellant, as to what "service" consists of, there is no room for saying that an occasional visit, by a salesman who makes minor adjustments in the equipment as he goes along, constitutes "service" as that term is employed in paragraph 6 of the contract.

Under the contract, the making of periodical inspections and the making of minor adjustments is a privilege rather than a duty. Paragraph 12 of the contract provides that the Exhibitor shall permit Products to make inspections; and paragraph 4 provides that Products shall have the right to require the installation of new parts; paragraph 2 provides that the Exhibitor shall purchase these new parts from Products and from no one else. Thus, what appears as a duty is converted into a privilege—a privilege which makes of every service man a salesman with power to dictate what the buyer shall buy. Obviously, to sell new equipment and new parts, it was necessary for appellant to go over and inspect the equipment periodically, and to send a man to the theatre for that purpose. Appellant sent what are called "service-men" to the theatres of appellee about once a month—not al-

ways that often. These men came to inspect the equipment and to sell merchandise. (Pr. Rec. P. 374)

On page 288 of the Record, the witness Lawrence, who served as one of appellant's service-men and who was called by appellant as a witness, puts it this way:

> "I made those inspections with the view of preventing breakdowns; my work amounted to more than that, though; periodically we received engineering information from our Engineering Department of new discoveries and improvements and we put those into effect in the equipments in the theatres we were servicing, having a regular service of information of that sort forwarded to us and it was our duty to see that those new devices were installed in those theatres if we could sell the defendant on the idea."

Naturally enough, the contract provides that this periodical inspection and minor adjustment service is to be rendered without extra charge. Paragraph 8, as already pointed out, provides:

> "The Exhibitor also agrees upon rendition of invoices to pay for any services rendered and expenses incurred by Products' employees in connection with and for the benefit of the Exhibitor, except for the regular periodical inspection and minor adjustment service hereinbefore provided for." (Pr. Rec. P. 178)

The first portion of this paragraph provides in general terms that the exhibitor agrees to pay for any service rendered for the benefit of the exhibitor. If

nothing more were said, the "periodical inspection and minor adjustment service" referred to in paragraph 4 would have to be paid for. This would be so because the phrase "any service" is equivalent to all service. In order to avoid that construction, it was necessary to add the concluding portion of the sentence, which reads: "except for the regular periodical inspection and minor adjustment service heretofore provided for." Obviously, the purpose was to provide that the periodical inspection and minor adjustment service provided for in paragraph 4, was not to be paid for—that it was something that was to be taken care of by the high rental charge that was to be paid. If that was not the purpose, why was the clause inserted? Upon the trial, counsel for appellant contended that what the concluding clause really refers to is the service to be rendered under paragraph 6. Not, that this service should not be paid for; but that the clause should be construed as though it read: "except for the regular periodical inspection and minor adjustment service *the payment of which is* heretofore provided for." But if the payment of the service to be rendered had already been provided for, why provide that it should not be paid for? If the service was to be paid for anyway, why except it from a provision making a general provision for payment? Why speak of it at all? It would take care of itself. The courts do not presume that parties to a contract use idle and unnecessary language; and it goes without saying

that they will not resort to the interpolation of words in order to convert what is essential, plain and unambiguous into what is unnecessary, uncertain and meaningless.

The Court merely gave effect to this provision in the contract when it instructed the jury that: "Said agreements (of March 28, 1929) or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment." And as already pointed out, the exception taken does not relate to periodical inspection and minor adjustment at all—it is to the effect that the leaving of blank spaces in paragraph 6 did not make the service free. Of course, no one contends that the leaving of these blank spaces resulted in requiring appellant to render service free—it simply resulted in making the whole paragraph inoperative, so that appellant was not required to render "service," and appellee was not required to pay for it. In other words: appellant was not required to keep appellee's equipment in repair, and it may be added parenthetically that it never kept a service-man on call and never made a single repair to the equipment. (Pr. Rec. P. 675; P. 823) And while appellee Gross was not required to pay for this services, it became necessary for him to spend large sums in qualifying his own men and securing instruction for them, and also in hiring additional qualified help to keep his own equipment in repair; which he did. (Pr. Rec. PP. 318; 672; 801.) (Also Record P.

784 and P. 832.) Upon the question of how thoroughly and exclusively the equipment was taken care of by appellee's own men see: (Pr. Rec. P. 674 et seq.; P. 802 et seq.; P. 826 et seq.)

The question of what was the effect of leaving the blanks in paragraph 6 therefor becomes immaterial in so far as a discussion of this particular instruction given by the Court is concerned, but since counsel has discussed the matter, we do not feel warranted in ignoring it. At the outset, we must bear in mind that this contract is written upon a printed form prepared by appellant; ostensibly for appellant. In such cases the contract is always construed most strictly against the party by whom it was prepared. The contract contains no express provision under which appellant agrees to render "service," as defined by the witnesses and as it is admitted to be by Vice-President Wilcox; this, for the obvious reason that an express obligation to keep the equipment in repair might lead to endless and costly litigation. All the contract contains—if the blanks are filled in—is a provision to pay at a fixed rate for service, which, it is apparent from the testimony of Vice-President Wilcox, was customarily rendered. (Ev. Wilcox, Pr. Rec. P. 292). Standing alone, the provision would be without consideration, but as part of the original contract—if the blanks had been filled in at the time of its execution—the mutual covenants of the contract might supply the consideration.

But the blanks were not filled in and the question is: What was the effect?

At the outset it must be noted that there is no room for implied authority or separate understandings with reference to these blanks. Paragraph 20 of the contract expressly provides:

> "The parties hereto expressly stipulate that this agreement as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof, and that there is no other understanding, agreement or representation, express or implied, in any way limiting, extending, defining or otherwise relating to the provisions hereof or any of the matters to which the present agreement relates." (Pr. Rec. P. 186)

It was the obvious purpose of the parties to leave paragraph 6 incomplete and ineffective—leave it out of the contracts entirely, as though it had never been there. And this is in accord with the verbal testimony of the parties upon the subject. Appellant's witness Anderson, by whom the contracts were executed on behalf of appellant, testifies as follows: "In view of the uncertain situation with respect to Alaska, the plaintiff company had no knowledge at the time of the negotiation of the contracts, exhibits 1 and 3, of the probable cost of furnishing engineering service for the theatres in that territory."

It was consequently unwilling to enter into a contract which would fix the amount of its compensation

for the rendering of such service when the cost of rendering it was still an unknown quantity and was willing only to enter into such contract upon the understanding that the weekly charge for servicing would be made the subject of a subsequent agreement between the plaintiff company and the exhibitor. Accordingly, when the contracts, Exhibits 1 and 3, were executed, the amount of the weekly charge for servicing the equipment was left blank." (See Pr. Rec. PP. 169-170) A portion of this evidence was probably incompetent, in view of the provisions of the written agreement, and it was admitted over appellee's objection; but the important thing about the evidence is that it shows an unwillingness on the part of appellant to make paragraph 6 complete or effective at the time the contract was executed. Then too, Gage, appellant's agent, told appellee that the contracts had been executed with the service clause left out and that appellee would have to provide his own service man. (Ev. Gross Gross, Pr. Rec. PP. 117-118; Ev. Cawthorn, Pr. Rec. P. 476); Gross made provision to service his own equipment. (Pr. Rec. P. 318); Wilcox, appellant's Vice-President, said, "Gross has no service with us." (Ev. Gross Pr. Rec. P. 319; Ev. Lemieux, Pr. Rec. P. 802); no attempt was made by appellant to collect service charges until it attempted to secure a supplemental agreement providing for them. (Ev. Gross, Pr. Rec. PP. 319-320); and, finally, appellant used highly coersive measures to bring about the execution of a

subsequent agreement with a view of making paragraph 6 effective. It may be added that it was upon the supplemental agreement that appellant relied to recover service charges in this action. Obviously, it did not consider itself entitled to service charges under the original agreement at the time this action was brought. All this goes to show that all were agreed that paragraph 6 of the original contracts was and is of no effect.

But we are not compelled to rely upon the testimony and acts of the parties, for the Courts have uniformly held that printed forms with the blanks left blank are ineffective, because incomplete, in so far as the provisions in which the blanks occur are concerned.

The exact point was before the Court in the case of *Church vs. Nobel*, 24 Ill. 292. It was an action on a lease contract.

According to the opinion, the defendant had agreed to do certain things under certain conditions, and "in addition thereto to pay the plaintiff the sum of $————." In affirming a judgment denying relief, it was said: "The party of the first part did not contract to pay anything in addition, for blank dollars are no dollars. We cannot make contracts for parties; we can only interpret them to enforce them. We interpret this to mean that $————dollars are the measure of damages agreed upon by these

parties; and they are no dollars, and therefore nothing was to be paid."

The case of *Rhyne vs. Rhyne*, 66 S.E. 348, was an action on a bond containing a blank which had not been filled in. A judgment granting relief was affirmed because the amount could be ascertained from other parts of the contract; but the Court took the precaution of adding: "We recognize the general rule that if a blank be left in an instrument, the omission may be supplied only if the instrument contains the means of supplying it with certainty."

In the case of *Lore vs. Smith*, 133 So. 214, the Supreme Court of Mississippi was called upon to decide what effect was to be given to a clause in a deed of trust, upon a printed form, containing blanks that had not been filled in. In denying relief, it is said:

> "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause should not become operative, unless an agreement can be implied therefrom that the grantee or cestui que trust should fill the blanks in accordance with the intention of the parties. We are not called upon to decide whether such an implication here arises; for the grantee or cestui que trust did not attempt to assert such a right, but recorded the deed of trust without filling the blanks. 'A writing is incomplete as an agreement where blanks as to essential matters are left in it, unless they can be supplied from other parts of the writing itself.' 13 C. J. P. 308, or unless and until such blanks are lawfully filled."

This case is on all fours with the case at bar.

In the face of all this, counsel maintains that the later portion of the section was rendered meaningless by not filling in the blanks, and that the effect of not filling in the blanks is simply this: That while this provision which contains the blank places a limitation upon the amount that can be charged by Products, the failure to fill in the blanks makes this provision meaningless so as to wipe out this limitation and give Products a right to charge whatever it pleases—in other words it takes off the limit. This would indeed make the contract a very remarkable document, under which one party agrees to pay whatever the other party may demand. But the decisions of the Courts do not permit the adoption of any such construction. In the case of *Church vs. Nobel*, 24 Ill. 292, the Supreme Court of Illinois held that blank dollars means no dollars, and that an agreement to pay blank dollars was an agreement to pay no dollars. Applying that decision to the facts before us, paragraph 6 of the Contract is made to read:

> "The amount of such payment shall be in accordance with Products' regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be 'No Dollars' per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of 'No Dollars' per week." (Pr. Rec. P. 177)

And this decision of the Supreme Court of Illinois, is in exact accord with the other decisions cited above upon this point.

The effect of these decisions is simply to make the whole of section 6 inoperative. This contract was made upon a blank form supplied by appellant. The provisions of paragraph 6 didn't fit the case. The parties didn't print another blank form, but simply used the one they had and left the blanks blank with the obvious purpose in view of making the whole paragraph inoperative. According to the testimony of the Witness Anderson, appellant was unwilling to sign a contract with these blanks filled in. There was no way to tell what the cost of the service would be, and subsequent developments simply showed that the service couldn't be rendered at all. It was the evident intention to leave paragraph 6 inoperative, just as though it had never been, and this is also the intention that the Courts impute to the parties in such cases, as was said in *Lore vs. Smith*, 133 So. 214, above referred to: "The omission to fill in the blanks in the future advance clause of the deed of trust indicates an intention that the clause should not become operative." Any other interpretation would lead to ridiculous conclusions, as the interpretation placed upon the contract by counsel for appellant at the present time would place upon appellee burdens that no rational man would assume. It may be true that a Court of law cannot relieve a party from the performance of obligations

that are harsh and burdensome, but it is also true that a Court will not adopt a construction that will lead to the imposition of harsh and unusual burdens and that will lead to ridiculous conclusions, if the contract is open to another construction that is both fair and rational.

But what is far more significant, the construction urged by counsel for appellant would make the provisions of paragraph 6 void for uncertainty—there would be no way to tell the amount to be paid from the contract. It would not be a case in which the amount to be paid could be determined from a fixed schedule to which reference was made in the contract. The schedule would not be fixed— it would be whatever schedule appellant might "from time to time establish" —appellant might establish one schedule today and another one tomorrow. The amount to be paid would depend entirely upon the whim and the will of appellant; in other words, it would be an agreement to pay whatever appellant might from time to time demand, without limit and without restriction. This would not be a contract at all. A contract, among other things, is an agreement to do a certain thing—not an agreement to do what one of the contracting parties may require.

POINT II.

Under this heading appellant's counsel complains because the Court refused to instruct the jury that at

the beginning of the trial appellee owed appellant $91.01 for additional equipment furnished by appellant. The point is sought to be raised on the refusal of the Court to grant an instruction set out at length on page 22 et seq. of appellant's brief. A general exception was taken to the refusal of the Court to grant this instruction, but no grounds of exception were stated. (Pr. Rec. P. 978) Under these circumstances the exception raises nothing for review; but even though the matters urged by counsel were stated as grounds for the exception, the point would be without merit.

Section 8 of the contract provides in part: "The exhibitor agrees to pay * * * for any additional equipment * * * upon delivery thereof." (Pr. Rec. P. 178 There is no evidence in the record that the parts referred to in this instruction were ever delivered. Hence, there is no evidence to show that anything was due on account thereof. But there is abundant evidence to show that appellee had over-paid appellant to the extent of many thousand dollars under duress and otherwise. Hence, to give this instruction would be to instruct appellee's counter-claims out of the case.

On page 22 of appellant's brief it is said:

> "On the trial, plaintiff proved by uncontradicted, documentary evidence that it furnished additional equipment and parts to the defendant; that the defendant received, and receipted for, this equipment; and that there was due and un-

> paid, when this action was begun, $29.09 for such equipment furnished at Juneau and $61.92 for such equipment furnished at Ketchikan."

Counsel is mistaken in this. Neither the documentary evidence nor any other kind of evidence proves what counsel says was established. The fact that these small amounts—$29.09 for Juneau and $61.92 for Ketchikan—were due and owing, is denied by the Answer. The only evidence offered at the trial by the appellant upon this subject was the evidence of one Pearsoll. He testified on page 299 of the Record as follows:

> "Plaintiff has the original orders for that spare parts and additional equipment and his receipts therefor, signed by defendant or his manager, which I now produce."

The record then proceeds:

> "Whereupon said orders and receipts were received in evidence marked Plaintiff's Exhibit No. 26."

Now, the particular items for which suit was brought are described in the Complaint. Those furnished to the Juneau theatre are referred to on the bottom of page 6 of the record and on the top of page 7 as having been furnished between May 20, 1930, and February 17, 1931; and those furnished to the Ketchikan theatre are described on page 13 of the record as having been furnished between April 7, 1930, and February 18, 1931.

Turning now to Exhibit 26 and 27: they contain all the receipts signed by appellee, or his agents, for merchandise delivered; and, according to the testimony of Pearsoll, the receipts in these exhibits cover all the merchandise that was delivered. We find that exhibit 26 contains no receipts signed by appellee Gross or anyone else, although exhibit 27 does contain such receipts; but each and every one of these receipts was signed prior to April, 1930, so that not one of them is a receipt for any of the merchandise sued for in the Complaint.

On the bottom of page 307 is one of two receipts for goods shipped that comes within the dates mentioned in the Complaint. It reads as follows:

> "Order dated 7-16-30 shipped to Coliseum Theatre, Juneau, receipted by J. S. Briggs, viz."

Now, while this receipt was signed, it wasn't signed by the appellee or any of his agents. J. S. Briggs was the agent of appellant: he was the man who was the head of the Seattle Service Department, residing at Seattle, at that time, and had nothing to do with appellee whatsoever. He testified in this case as one of appellant's witnesses and supplies us with all this information. (Ev. Briggs, Pr. Rec. P. 912)

On page 308 of the transcript is another order dated 7-16-30, shipped to Coliseum Theatre, Ketchikan, receipted by J. S. Briggs. This order also comes within the time, but this is the same J. S. Briggs who signed

the receipt just previously referred to—he was the agent of appellant, and not the agent of appellee.

If these receipts, signed by Briggs, prove anything, they simply prove that these shipments were shipped from Los Angeles to Seattle, to Briggs, and that they are still at Seattle and never went any further, so that there is not only a failure of proof that these items were delivered to appellee, but the receipts themselves show that they were never delivered to appellee but to Briggs.

But this liability exists, if it exists at all, under the provisions of Par. 8 of the contract, which provides that what appellee agrees to pay to appellant for the articles of merchandise referred to is appellant's "list of installation charges as from time to time established." It is not only impossible to tell from the contract what the amount to be paid shall be, but the whole matter is left to the will of appellant—no one can tell what the price will be until appellant has expressed its will by establishing, from time to time, its lists of prices. Obviously, this provision is void for uncertainty. It must be borne in mind that this is not a case where a party agrees to pay according to an established schedule, but according to whatever schedule may from time to time be established by the other party. If merchandise were actually delivered under this provision, its reasonable value could be recovered on a quantum meruit; but a failure to pay such reasonable

value would not work a forfeiture of appellee's rights under the original contract.

On page 24 counsel quotes the instruction that the Court did give with reference to the amounts due for additional and spare parts. He then criticises this instruction as being obscure or confusing. No exception was taken to it. That being so, it became the law of the case, so that no further instruction upon that subject was either necessary or proper, and the Court's action in refusing to give a further instruction was not error.

But as we have already pointed out, there was not only a failure of proof on the part of the appellant in that it didn't prove that these articles were ever delivered to the appellee, but the appellee had also introduced evidence that he made over-payments in the way of monies paid under duress which were then in the possession of the appellant, and which, of course, would be a set-off to any claim for spare parts or other merchandise, and which could in any case be applied as payment for such merchandise.

POINT III.

Under this heading counsel for appellant maintains that the Court erred in giving an instruction which is set out at length on page 26 and 27 of appellant's brief.

To this instruction appellant took an exception in the following language:

> "We except to that part of the court's instruction No. 3, commencing on line 21, page 15, par. 4, down to the remainder of that particular instruction 3, on the ground it does not state the true principle of law applicable to written instruments or contracts particularly, and that neither party is bound by the particular provision that only a president or vice-president could change these contracts if they afterward agree to change them otherwise." (Pr. Rec. PP. 1025-1026)

Here is an attempt to state the grounds of the exception; but the grounds, as stated, are too indefinite, uncertain, and incomplete—they are not such as to direct the attention of the trial court to any particular mis-statement of law. It is objected that the instruction "does not state the true principle of law applicable to written instruments;" but there are many legal principles applicable to written instruments, and it is not stated which of these is violated, nor is the court's attention called to the true principle that should govern—so far we have nothing but a general objection. The objection continues, "and that neither party is bound by the particular provision that only a president, or vice-president could change these contracts if they afterwards agree to change them otherwise;" but the instruction does not deal with this matter at all. The court does not instruct that the provision relating to the authority of agents in any wise limit the parties themselves. The instruction deals solely with

the authority that third parties—agents and representatives—can exercise on behalf of the parties under the provisions of the contract and with the manner in which this authority must be exercised. No part of the objection, therefor, calls the court's attention to any mis-statement in the instruction.

This exception is not sufficient. *Allison vs. Standard Air Lines*, 65 Fed. 2nd. 668; *Davis vs. North Coast Transportation Co.* 295 Pac. 921; *Parton vs. Barr*, 24 Pac. 2nd. 1070). These and other cases were discussed at some length in connection with the discussion had under Point I of this brief.

The first objection to the instruction, urged by counsel in his brief on pages 27 and 28, is that the Court told the jury ratification by the parties was necessary; while the appellant maintains—we think erroneously—that ratification by one party would be sufficient. It would seem that if a contract were made in violation of the provisions contained in an earlier contract between the parties that ratification by both parties would be necessary. But even though counsel were correct in his contention, he is not in position to raise the question now. There is absolutely no reference in his exception to this matter at all.

The first portion of the instruction excepted to is a mere statement, word for word, of the language of the original contracts. Here there is no room for error.

The alleged contracts of September 4 (Ex. 2 and 4) referred to in the instruction are upon the printed letter-head of appellant. Exhibit 2 is set out at length on pages 189 and 190 of the Record. Exhibit 4 is exactly like exhibit 2 except that it relates to the Ketchikan theatre.

It will be noted that these agreements do not purport to be the agreements of appellant. Appellant's name is not even mentioned in them. True, they are written on appellant's letter-head, but the letter-head forms no part of an agreement written under it. If it did, many people—hotel-keepers, for instance—might find themselves entangled in strange and unlooked for complications. The rule is that printed matter in the heads of letters upon which a contract is written, which is not referred to in the writing, is not a part of the contract.

Summers vs. Hibbard, 153 Ill. 102, 38 N.E. 800.
Lumber Co. vs. McNeeley, 108 Pac. 621.

In *Summers vs. Hibbard* it was held that the words, "All sales subject to strikes and accidents" printed on the caption of the paper on which was written the unqualified acceptance of a contract of purchase did not have the effect of reading them into the agreement thereby consummated. The court said:

> "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words 'all sales subject to

> strikes and accidents,' no more made those words a part of the contract than they made the other words there printed, 'Summers Bros. & Co., Manufcturers of box-annealed common and refined sheet-iron,' a part of the contract."

If, as the court says, the name of Summers and Co. did not become a part of that contract, the name of the Electrical Research Products Co. did not become a part of the contract now being discussed.

The second case cited follows the first.

These contracts, Ex's. 2 and 4, do not contain appellant's name and do not refer to the letter-head and they were not signed by appellant but by one Anderson who adds the word "Comptroller" to his signature without indicating whom he is comptroller for. Nor does the letter-head show Anderson to be the comptroller for appellant. Now it is the rule that where an instrument is signed by an individual who signs as agent or representative it may be shown that he acted for a principal described in the writing; but in this case the alleged principal is not even referred to in the writing. Nor is the word "comptroller" synonymous with the word "agent"—a comptroller is not an agent at all. A comptroller, generally speaking, is one who examines accounts, not one who exercises the authority of another.

Nor is this all, Ex's. 2 and 4 refer to the contract to be modified as one relating to the "installation and use of 'Western Electric Equipment'." The original

contracts are not for Western Electric equipment but for "Type 2-S equipment." It is true that this equipment is often referred to as Western Electric equipment, but the term Western Electric is not used in the contract in describing the equipment. The only reference to Western Electric Equipment in the original contract is in Par. 23, which provides for the termination of a previous agreement which did relate to Western Electric equipment. (Pr. Rec. P. 187)

Nor is there anything in the Record to show that Anderson had authority to execute these agreements in his own name as comptroller or otherwise. His authority is defined in the two resolutions of the board of directors, as authority "to sign in the name and on behalf of the company contracts, etc." (See Pr. Rec. P. P. 192 and 193) These resolutions certainly do not authorize Anderson to sign contracts in his own name.

The portion of the charge that submits the issue to the jury immediately precedes the portion specifically complained of, and is as follows:

> "In this connection I instruct you that the alleged contracts are signed by one "Anderson" who signed the same as 'Comptroller' without further describing himself, and that the question of whether said 'Anderson' was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions." (Pr. Rec. P. 996)

The appellant takes no specific objection to this portion of the instruction; but the instruction must be

considered as a whole, so that it becomes necessary to inquire into the whole matter, at least to some extent in order to show that the issue was fairly presented to the trial jury.

Turning now to that portion of the exception which reads: "that neither party is bound by the particular provision that only a President or Vice-President could change these contracts if they afterwards agreed to change them otherwise." The provision of the contract referred to in the exception reads:

> "No agent or employee of Products is authorized to alter or modify this agreement in any way unless such alteration or modification shall be approved in writing by the Rresident or a Vice-President of Products, or by such representatives as may from time to time be designated in writing by either of such officers." (Pr. Rec. P. 186)

There is no evidence in the Record tending to prove that the contracts in question were approved in writing or otherwise by the President or Vice-President or by any other representative designated by such officers.

Now, where did Anderson's authority come from? The board of directors had authorized him to make contracts in the name of and on behalf of the company, but not in his own name. In any event the resolution did not comply with the provision of the contract because the board is not the President or Vice-President. Then, too, the action of the board was something to which

Gross was not a party and about which he was not informed. Gage forced Gross to sign these contracts under duress but told him nothing about Anderson. (Ev. Gross, Pr. Rec. P. 325). Nor could Anderson have power to modify this particular contract under any general authority conferred on him in the face of the specific limitation upon such authority contained in this contract. It requires no extended discussion to show that in such case the general authority would be limited by a specific limitation such as that contained in the contract. Let us put the shoe on the other foot. Let us suppose that the appellee should bring suit to enforce these contracts and that appellant should set up Anderson's lack of authority as a defense. Does any one suppose that Gross could prevail? He had solemnly agreed with appellant that there should be a limitation upon Anderson's power, and no subsequent agreement had removed this limitation.

Seemingly counsel invokes the legal principle, that if parties have the power to contract, they have the power to modify the contract made in any way notwithstanding limitations upon their power in this regard by the terms of the contract. But this stipulation is not a limitation upon the powers of the parties in respect to a modification of the contract; it merely provides that third parties, agents of appellant, shall not have power to bind appellant except in the manner prescribed. Now, it is idle to say that this provision has no legal effect—it is not against public policy—

there is nothing wrong with it. The parties themselves may ignore limitations placed upon their own power, but this does not mean that third parties can ignore limitations upon their authority and still bind the parties who have agreed upon the limitation. To adopt counsel's view would be equivalent to saying that under the provision a third party cannot act except in the manner prescribed unless he chooses to act in some other manner.

The effect of the insurance cases cited by counsel is well illustrated by the first case cited. It is only necessary to consider the portion quoted by counsel on pages 28 and 29. At the outset the Court says that provisions in an insurance policy, more or less similar to the provision in the contract now under discussion, are "integral parts of the policy and until revoked or modified in some legally recognized manner are valid and binding upon the insured." The court then holds that the company cannot contract itself out of the legal consequences of its subsequent acts, and that it is legally possible for it by duly authorized action, to destroy the special protection as originally set up. There is no doubt about the correctness of this decision. The appellant and appellee could have entered into a subsequent contract doing away with this limitation upon the power of appellant's agents, but Anderson, who was an agent to which this limitation of power applied, could not make a contract in his own name or in the name of the corporation, for that matter, in disregard

of the limitation placed upon his own power. To hold otherwise would be to hold that a third party, shorn of power by the parties to a contract, could invest himself with the very power of which he was deprived, by simply exercising the power which the parties themselves had agreed he should not possess.

Moreover, the whole point is immaterial, for if what is referred to as error were error it would be harmless. The evidence conclusively, shows that the signature of Gross to these contracts was procured by threats which amounted to duress; and the jury so found by finding for appellee on the second counterclaim; that the contracts lack consideration; and that no service was ever rendered under them—that appellee's own men made every repair that was ever made.

POINT IV.

Under this heading counsel for appellant contends that the Court erred in denying plaintiff's motion to strike the allegations of duress from defendant's First and Fourth Affirmative Defenses as irrelevant and immaterial. A general exception was taken to the order over-ruling the motion, but no grounds of exception were stated. (Pr. Rec. P. 168)

Counsel does not take the position that the defense of duress was not properly pleaded, but that this defense should have been stricken because it was imma-

terial for the reason that it made no difference whether the contracts of September 4, 1929, were valid contracts or not, in that the obligation to pay service charges rested not upon the contracts of September 5, but upon paragraph 6 of the original contracts; the contention of counsel being that these contracts of September 4 were mere letters and not contracts at all, so that they didn't require the signature of appellee, and that this being so it is wholly immaterial whether appellee signed them or not.

But in the Complaint, appellant not only holds out these documents of September 4 as contracts, but it bases its action upon them. Paragraph 2 of the complaint (Pr. Rec. P. 2) reads in part as follows:

> " * * * Plaintiff and defendant heretofore and on or about March 28, 1929, entered into a certain written agreement, and thereafter and on or about September 4, 1929, mutually modified said agreement, in which agreement, as so modified, they mutually agreed, among other things * * * ."

Indeed, if these documents are not contracts all the exceptions taken relating to matters connected with their execution become immaterial, and appellant's action fails for, as was pointed out under point one in this brief, the leaving of the blanks in paragraph 6 makes that paragraph ineffective for any purpose.

POINT V.

Under this heading counsel maintains that the Court erred in over-ruling appellant's demurrer to the Second and Fourth Counterclaims for the recovery of monies alleged to have been paid to appellant under duress. The order over-ruling the demurrer appears in the Record on pages 78-79 and it embodies a general exception; but neither the order nor the exception were made part of the Record by bill of exceptions—they were merely transmitted by the Clerk of the District Court to the Clerk of this Court, and printed in the Record. The demurrer being a pleading, it is part of the Record without being incorporated in the bill of exceptions, but the order over-ruling it is not an order that affects the merits or that necessarily affects the judgment, so that it is not a part of the Record, and cannot become so except by being incorporated in the bill of exceptions.

Counsel does not claim that the allegations in themselves are insufficient to set up duress, but that the counterclaim is one that could not be set up in this action. In presenting this point appellant's counsel proceed upon the assumpton that an action of replevin is always one that sounds in tort, and upon the further assumption that the action is based upon nothing except the refusal of the defendant to deliver the replevined property upon demand. To support this proposition appellant relies upon the case of *McGarger vs.*

Wiley, 229 Pac. 665. In that case, however, the contract which serves as the foundation for the plaintiff's action was not set forth in the Complaint; in the case at Bar the contract is set forth and the case itself can be distinguished from the case at bar in the manner that two Kansas cases were distinguished by the Supreme Court in a case to which reference will presently be made.

While the Supreme Court has set this whole question at rest by holding against the doctrine announced by the Oregon Court, it is interesting to note in passing that the reasoning employed by the Supreme Court of Oregon was not sufficiently convincing to satisfy Judge Bean and Judge McBride, both of whom dissented. However, in view of the decision by the Supreme Court in the case of *Clement ve. Field*, 147 U. S. 467; 13 Sup. Ct. Rep. 358, it is unnecessary to inquire into the reasoning advanced by the Supreme Court of Oregon. In Clement vs. Field the Court was called upon to pass upon the identical question before the Supreme Court of Oregon—that is to say, of whether in an action of replevin brought to recover a portion of property held under a contract of sale the defendant could set up a counter-claim claiming damages for breach of warranty in the contract of sale, and the Court held that this could be done. In passing upon the question it is said:

> "Another objection urged to the judgment of the court below is that the action in replevin was an action founded upon tort, and not upon

contract; that a set-off can, under the Code of Kansas, only be pleaded in an action founded on contract; and that hence the defendants in the replevin suit in question could not legally plead a set-off of the damages caused by the breach of warranty.

"The supreme court of Kansas disposed of this contention in *Gardner vs. Risher*, 35 Kan. 93, 10 Pac. Rep. 584, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could, notwithstanding that the form of the action was replevin, avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortage to comply with his contract.

"The later case of *Kennett vs. Ficket*, 41 Kan. 211, 21 Pac. Rep. 93, is cited on behalf of plaintiff's in error as holding that a set-off cannot be pleaded as a defense in an action of replevin, because such an action is founded upon the tort or wrong of the defendant, and not upon contract. An examination of these two cases satisfies us that they are not irreconcilable. They were both suits in replevin, but in the earlier case the plaintiff's cause of action originated in the provisions of a chattel mortgage, and the suit in replevin was resorted to in pursuance of one of those provisions, and was regarded by the court as in substance founded on contract. The later case was founded on a wrongful taking by the defendant of property of the plaintiff, and was therefore, in substance as well as form, an action ex delicto.

> "The replevin suit pleaded in answer in the present case was substantially a proceeding in enforcement of contract provisions, and therefore within the decision in *Gardner vs. Risher*, 35 Kan. 93, 10 Pac. Rep. 584."

It will be noted that in the case at Bar the Complaint sets forth the original contracts, the supplemental contracts, and the facts constituting the alleged breach upon which the right to recover the property is based.

The Alaska statute, as is pointed out by counsel for appellant in his brief, contains two sections. The first provides:

> "First. A cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim."

Now the first question that arises it: Does this counter-claim, under which it is sought to recover these monies alleged to have been paid under duress, embrace a cause of action arising out of the contract or transaction set forth in the Complaint as the foundation of the plaintiff's claim? The contract is pleaded in the Complaint and the identical contract is pleaded in the counter-claim. Appellants claim the right to recover the equipment because certain service charges and certain charges for equipment were not paid in accordance with the contract. Appellee claims that these service charges were not due under the contract and that he was compelled, by duress, to pay a consid-

erable amount in the way of service charges which under the contract he had not agreed to pay; and that he was, under the contract, entitled to the possession of certain equipment of which appellant threatened to deprive him if these service charges were not paid; and that, because of the ruinous effect this would have on his business, he paid the service charges. This counterclaim, if well-founded, would, of course, defeat appellant's claim of something less than $100 for additional and spare parts, which, while it was not established by the evidence, was nevertheless included in the Complaint; and in addition to this it would result in reimbursing appellee for alleged service charges collected under duress. The whole matter forms but a single transaction which consists of a series of acts commencing with the signing of the contracts and terminating with the taking of the equipment under the writ of replevin.

The Courts, in construing this section of the Statute, are extremely liberal, not only because it prevents a multiplicity of suits, but also because liberality in its construction promotes the ends of justice—especially in such cases as the case at Bar. Here the appellant, a foreign corporation, comes to Alaska and invokes the aid of the Alaskan Court for the purpose of recovering a judgment against a resident of Alaska. Its business is not such as to require domestication, and the appointment of an agent upon whom service of process can be made. If these matters required the

bringing of an independent action, appellant could come to Alaska, litigate a portion of the differences existing between the parties, and then retire so as to compel the appellee to pursue it and bring action against it in the Courts of New York; obviously, this would result in a denial of relief. It is just such situations as these that induce the Courts to adopt a liberal construction of these statutes. Thus in the case of *Advance Thresher Co. vs. Klein*, 133 N.W., 51, the Supreme Court of South Dakota held that in an action brought to recover a balance due from the sale of a threshing machine the defendant could set up a counter-claim for damages to his son resulting from the negligence of the agent of the threshing machine company. The facts, briefly stated, are these: The plaintiff had sold the defendant a threshing machine; it had agreed to keep the machine in repair, and defendant had agreed to help the plaintiff in making repairs. The plaintiff's agent, sent on one occasion to make repairs, called on defendant's boy to help him, and then suddenly started the machinery in such a way as to injure the boy. The boy, it was claimed, was helping as the representative of the defendant in connection with his agreement to help put the equipment in repair. The father had paid out a considerable sum as doctors' bills and had suffered other losses due to the boy's minority, and claimed a sum considerably in excess of the amount claimed due on the threshing machine. The Court held that this counter-claim could be sustained under the statute.

The Court held that the term "transaction" was not limited to the facts set forth in the complaint, but included the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of the agreement. In the course of the opinion it is said:

> "The plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist on a judgment on that fact alone, if the fact is so connected with others that it forms only a portion of the transaction."

The decision is based, in part, upon the case of *Story & Isham Commercial Company vs. Story*, 34 Pac. 671-673. This decision is by the Supreme Court of California.

So also in the case of *Bannerot vs. McClure*, 90 Pac. 70-71, it is said by the Supreme Court of Colorado:

> "The word 'transaction' is much more comprehensive than the word 'contract.' Any cause of action, therefore, whatever its nature, arising out of the cause of action alleged in the complaint, or connected therewith, in favor of the defendant and against the plaintiff, is a proper counterclaim."

In the case at bar, the right of the plaintiff to recover hinges on the construction of the contracts between the parties with relation to service charges; and the right of the defendant to recover on this par-

ticular contract hinges, at least to a very large extent, upon the same matters. All the dealings between the parties relating to these service charges, and relating to the equipment and the keeping of the equipment in appellee's theatre under the contracts, form part of a single transaction.

But the Alaska statute, correctly quoted on page 35 of appellant's brief, contains a second provision which reads as follows:

> "Second. In an action arising on contract any other cause of action arising also in contract and existing at the commencement of the action."

Now, under the Supreme Court decision above referred to, there can be no doubt that the present action, even though it is an action in replevin, is an action on contract. That being true, any other action also arising on contract may form the basis of a counterclaim.

It may be a tort to extort money under duress, but it does not follow that an action brought to recover monies so extorted is an action sounding in tort. When one extorts money from another, the law raises a promise to re-pay it, and when an action is brought to recover this money, the action may be brought on this implied promise; in other words, the victim from whom money has been extored may sue in tort for damages or he may sue in contract to recover the money. At common-law, the form of action would be implied

assumpsit, and in such cases it would be necessary to plead a fictitious promise to re-pay. But under the Code this is not necessary—under the Code it is necessary only to set up the facts—fictitious promises need no longer be averred.

Under this counterclaim the defendant does not seek to recover damages, but he seeks to recover the money paid, and the law raises the implied promise to re-pay. The action, therefore, is one sounding in contract; appellee has simply waived the tort and sued in assumpsit. This being true, the counterclaim is admissable as a cause of action arising on contract in a case where the action is founded on a contract. This is especially so because any recovery had on this counterclaim could be set off against monies claimed by appellant for spare parts or otherwise.

POINT VI.

Under this title, counsel maintains that the Court erroneously instructed the jury as to the measure of appellee's damages.

The Court gave the jury two instructions: No. 8 which appears on page 1005 of the Record, and No. 10 which appears on page 1010 of the Record. These two instructions are identical, and differ only in that one refers to the Juneau and the other to the Ketchikan theatre. They relate to the recovery that might be had by appellee under his counterclaims. To the giv-

ing of these instructions the appellant took the following exception:

> "Thereupon plaintiff, in the presence of the jury and before it retired for deliberation, excepted to the court's foregoing instructions (Nos. 8 and 10, Pars. 2, 3, 7, 9, these two instructions being the same except that No. 8 related to defendant's Coliseum Theatre at Juneau, whereas No. 10 related to defendant's Coliseum Theatre at Ketchikan) reading as follows: * * * . Then follow the portions of the instruction excepted to. They are set forth in the Record on pages 1026, 1027, and the upper portion of page 1028. After the portions of the instruction excepted to are set forth at length, the Record proceeds as follows on page 1028:
>
> "Which exception was as follows:
>
> "Also take exception to instruction number 8, Your Honor, particularly upon the ground we claim that is not a statement of the true measure of damages and no profits can be recoverable in this case in any event, and furthermore, that the defendant can not recover in this action upon his counterclaims in any event, and further, that portion concerning the purchase of new equipment, found on page 27 (last Par.) of that particular instruction, which we contend is not an element of damages in this case. * * * The same exception to instruction No. 10 as we took to instruction No. 8."

The language employed in stating the exception is too general and does not point out any particular in which the court is alleged to have erred. It is said:

"We claim that is not a true statement of the measure of damages." But the exception does not state what the true measure of damages is or in what particular the statement made by the court is in error. It is also to be noted that the portion excepted to does not contain a statement of the measure of damages at all—that is dealt with in a portion of the instruction not excepted to. It is then said, "and that no profits can be recoverable in this case in any event." Now, no one will contend that anticipated profits cannot be recovered in a proper case; and this exception does not inform the court why this is not a proper case. The exception then proceeds: "and furthermore, that the defendant cannot recover in this action upon his counterclaims in any event." But it is not stated why the defendant cannot recover. To say that a party cannot recover, is not to point out a specific error in instructions. The exception continues, "and further that portion concerning the purchase of new equipment found on page 27 (last Par.) of the particular instruction, which we contend is not an element of damages in this case." Here it is said that the appellant contends that this is not an element of damages in this case, but it is not pointed out upon what the contention is based. The court's attention is not directed to anything except a contention of counsel in general and sweeping terms. Moreover, counsel for appellant does not discuss or question the propriety of allowing damages for the new equipment purchased, in his brief. We therefore take it that that portion

of the exception is waived by him. The point is discussed in the original brief, but will not be discussed in this brief for the reasons stated.

That the loss of profits from the destruction or interruption of an established business may be recovered, where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was, it well settled by the authorities:

Central Coal & Coke Co. vs. Hartman, 111 Fed. 96-98.

Homestead Co. vs. Des Moines Electric Co. 248 Fed. 439-445.

Yates vs. Whyel Coke Co. 221 Fed. 603.

Alison vs. Chandler, 11 Mich. 542, 558; 13 Cyc. 59.

Lumber Co. vs. Creamery, 18 Fed. 2nd. 858.

Wellington vs. Spencer, 132 Pac. 675.

Lambert vs. Haskell, 80 Cal. 611, 22 Pac. 327.

Chapman vs. Kirby, 49 Ill. 211.

Tootle vs. Kent, 12 Okl. 674; 73 Pac. 310.

Denver vs. Bowen, 184 Pac. 357.

Sommer vs. Yakima, 26 Pac. 2nd. 92.

Ft. Smith & Western RR. Co. vs. Williams, 30 Okl. 726, 121 Pac. 275, 40 L.R.A. (N.S.) 494.

The portions of the instruction excepted to are so fragmentary and incomplete that they do not convey any meaning unless read in connection with what follows and preceeds. The entire instruction No. 8, which

is exactly like instruction No. 10, appears on page 1005 et seq. of the Record. The portions excepted to are set forth on page 1026 et seq. of the Record, and the entire instruction, with the portions excepted to in italics, is set out in our original brief on page 159 et seq.

In its Brief appellant urges two objections against the instructions of the Court, which are as follows:

> "A. The jury was permitted to award double damages;
>
> "B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectural."

Neither of these grounds is included in any exception taken at the trial; nor are they referred to in any error assigned.

Point A. is discussed on page 40 et seq. of appellant's Brief. It is there urged that under the instructions given, the jury were permitted to assess double damages. It is a complete answer to all that is said by appellant in its Brief that no exception was taken on this ground. Nowhere in the Record is there an exception on the ground that under these instructions, or any other instructions, the jury were permitted to award double damages.

But there is no merit in the point stated by counsel. It is true, that as a general proposition, double damages cannot be allowed, but under the instructions

in this case the jury were not permitted to award double damages. It must be remembered that the appellant leased to appellee this theatre equipment for a period of ten years, and that appellee paid appellant, in advance, prior to the removal of the equipment, the full sum of $10,500.00 as rent for the equipment in each theatre; that is to say, the sum of $21,000.00 for the equipment in the two theatres, so that appellee had an estate or an interest in this equipment worth $21,000.00 at the time of its installation, and a proportionate amount to cover the unexpired term at the time of its removal. When the equipment was removed, this estate or interest was destroyed, and the rental value sought to be recovered was merely the value of this estate or interest which was destroyed by appellant; it amounted merely to a recovery of advance rent paid appellant by appellee. This amount appellee would have had a right to recover in any case; but in this particular case the taking of the property had the additional effect of interrupting and interfering with a going, established, business, so that it resulted in additional damages, and these additional damages consist of the profits that would have been realized if the equipment had been left in place. The authorities and cases cited by counsel have no application. In the cases cited, the property was taken and returned, so that there was no loss of property, no diminution of the estate or interest in it, because the property itself was returned to the injured party. In

the case at bar, the equipment was taken away and shipped out of the territory, and was never returned to the appellee, so that he lost all that he had paid the appellant as rent for the equipment during the entire remaining portion of the ten-year period. When appellant broke its contract by wrongfully taking the equipment from the appellee, the advance rent paid by appellee for the remainder of the term was one of the elements of damage which appellee suffered and had a right to recover; and because of the fact that the taking of the property from appellee resulted in breaking up an established business, the profits that were lost were another item of damages which the appellee had a right to recover. It is not necessary to pursue this argument further, however, because the point cannot avail the appellant, for the reason that it was not included among the grounds of exception taken.

Referring now to Point B. which is discussed on page 42 et seq. of appellant's Brief, and which is to the effect that:

> "The jury was permitted to award damages for lost profits which were wholly speculative and conjectural."

The character of the evidence offered was discussed with some degree of detail in the original brief, but since counsel does not question its sufficiency except in the particulars mentioned in the brief, it is only necessary to deal with the evidence in so far as it relates to these particular objections.

But before doing this, we feel that we should again call the Court's attention to the fact that the matters here referred to by counsel were not embodied in any exception taken, and that the portions of the instruction submitting the issue of damages to the jury were not excepted to at all on any ground. The propriety of submitting the issue to the jury was therefore established as the law of the case. And even though appellant did ask for an instruction, which though uncertain and indefinite in its terms might possibly be regarded as a request to take the issue from the jury, appellant cannot now contend that the Court erred in submitting the issue and refusing its instruction, because by failing to except to the instruction submitting the issue, which thereupon became the law of the case, it waived the point now sought to be urged. Then, too, nothing but a general exception was taken to the refusal of the Court to give this instruction so requested, and no grounds of exception were stated. (Pr. Rec. P. 979)

Commencing on page 42 of appellant's Brief, appellant's counsel states the effect of the evidence to be as follows:

> "When plaintiff removed its equipment from defendant's theatres, defendant replaced that equipment with other equipment, which, although the best then obtainable, was inferior in sound quality to plaintiff's equipment. During the two years from approximately June 1, 1929 to May 1, 1931, while plaintiff's equipment was in defen-

dant's theatres, defendant operated those theatres at an average monthly profit of $2,000.52 at Ketchikan and $864.15 at Juneau. During the period after plaintiff's equipment had been removed, from approximately May 1, 1931, to May 1, 1933, defendant operated those theatres at an average monthly loss of $187.70 at Ketchikan and $489.98 at Juneau, whereupon defendant leased both theatres to one Shearer who, shortly thereafter, removed the equipment then in these theatres and replaced it with plaintiff's equipment, similar to that originally installed and subsequently removed by the plaintiff. During the eighteen months immediately following the reinstallation of plaintiff's equipment in these theatres, Shearer, the lessee, operated the Ketchikan theatre at an average monthly profit of $629.70 and the Juneau theatre at an average monthly loss of $267.62"

This statement of the evidence is very incomplete, but it is fair enough as far as it goes and it includes all the proof required by the courts to recover lost profits in cases where an established business has been interrupted. It should be borne in mind, however, in this connection, that both the Ketchikan and Juneau theatres were operated by Shearer for some considerable time with the inferior equipment installed, and that during this period his losses were as great as those sustained by Gross, and that the profits commenced to increase immediately after the installation of better equipment, and that the business which had been broken down because of the inferior equipment was gradually built up after the new equipment had

again been installed, so that the average monthly profit at Ketchikan, including the months while Shearer was operating with the inferior equipment, was $629.70 while the average monthly loss at Juneau, including the months while the inferior equipment was still in the theatre, was $267.62. And in this connection it must also be borne in mind that there were special reasons why the profits in Juneau did not increase to the same extent that those in Ketchikan had increased, under the Shearer management. (Pr. Rec. PP. 470-471)

Thereupon, on page 43 of appellant's Brief, counsel submits the following conclusions:

> "(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.
>
> "(2) Defendant wholly failed to show the amount of such loss, if any, caused by the removal of plaintiff's equipment."

At this point it should be stated that while we reviewed the evidence in the original brief with a view of showing its sufficiency, we will not burden the Court with a similar discussion in this brief because as we understand the brief of counsel for appellant, the sufficiency of this evidence is not questioned except in respect to the points expressly set forth in the brief; and on page 42 of appellant's brief counsel states the effect of the evidence, not fully but fairly, in so far as the statement goes. According to this state-

ment it is made to appear that appellee proved what his profits were during a period of two years before the equipment was removed and what the profits and losses were after the equipment had been removed until the theatres were leased to one Shearer, and also showed what the profits were after Shearer had reinstalled appellant's equipment. This is all that the authorities require in view of the fact that there is no question in this case but what the appellee had an established business that had been profitable for many years prior to the removal of the equipment. (Pr. Rec. PP. 362-363-374)

On page 43 of appellant's Brief counsel says:

> "It is well settled that lost profits cannot be recovered unless both the fact and the amount of such loss is established by something more than speculation or conjecture."

We fully agree with this statement, but we do not agree with counsel's conclusions as to what is required to satisfy the requirements mentioned. To support his views, that appellee did not comply with these requirements, counsel quotes from the case of the *Homestead Company vs. DesMoines Electric Company,* 248 Fed. 439. This decision was rendered by Judge Sanborn, and was based upon a decision previously rendered by the same Judge in the case of the *Central Coal & Coke Co. vs. Hartman,* 111 Fed. 96.

Following the quotation set out by counsel occurs a citation of this case and no reference to any other authority, so that there can be no question but what Judge Sanborn intended, for all intends and purposes, to embody what was said in the Central Coal & Coke Company case, as part of what was said in the Homestead case.

Now, in the case of the *Central Coal & Coke Co. vs. Hartman*, 111 Fed. 96, after stating that as a general rule profits cannot be recovered, Judge Sanborn says:

> "There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital investment and the expense deducted from the income during the interruption

> show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made, the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

In the case at bar, appellee did just exactly what was required by the decision of Judge Sanborn last above quoted from. The capital investment was carefully arrived at, interest was allowed on it, the property was depreciated in a manner that was not questioned by anyone, the amount of the monthly expenses covering the business and the amount of the monthly income derived from it were shown not only for a long time before but also during the interruption of which appellee complains. (Pr. Rec. PP. 366; Pr. Rec. P. 485, 506, 520, 534; Pr. Rec. P. 548, 549; Pr. Rec. PP. 558, 559, 560; Pr. Rec. PP. 561, 562, 563, 564, 565, 566 et seq.; Pr. Rec. P. 573; Pr. Rec. PP. 578, 598, 614, 631, 647; Pr. Rec. P. 656; Pr. Rec. P. 658 et seq., Pr. Rec. PP. 482-483; Pr. Rec. PP. 597, 504; Pr. Rec. PP. 708, 709, 710, 712, 720, 723; Pr. Rec. PP. 653, 654, 757, 504; Pr. Rec. P. 505; Pr. Rec. P. 652; Pr. Rec. PP. 575, 712, 765; Pr. Rec. P. 882. All the evidence to which these Record references relate was discussed in the original brief commencing on page 174, but for the sake of brevity and in view of the statements of counsel as to the effect of the evidence, that discussion is not repeated here.

The whole case was tried with a view of bringing it within the provisions laid down by Judge Sanborn.

At a later point in the decision Judge Sanborn indicates the character of proof required, and here again the decision was followed in the case at bar to the letter.

Following this quotation from the Homestead case, on page 44 of appellant's Brief, counsel makes the statement that the removal of appellant's equipment in April, 1931, could not have caused the defendant any loss of profits unless it caused a decrease in the number of persons attending defendant's theatres, and it is then contended that there was no evidence that the decrease was due to the removal of appellant's equipment.

Well, in addition to the fact that the appellee Gross, testified that there was a loss of business immediately after the inferior equipment was installed (Ev. Gross, Pr. Rec. P. 362); we have these uncontradicted facts before us—facts which are embodied in the statement of the evidence as counsel sets it forth on page 42 of his brief. Plaintiff's efficient sound-equipment was taken out of a sound moving-picture theatre, and in its place equipment of an inferior character was installed. This was followed by a loss of attendance and a loss of profits. Now, would any rational person be warranted in assuming that this loss of attendance and loss of profits did not result from the fact that

inferior equipment had been installed in the place of the efficient equipment that had been removed? But all this was for the jury.

Counsel seems to be of the opinion that appellee should have called each of his customers who ceased going to the theatre after the inferior equipment had been installed, and who ceased going because the equipment was inferior. We are of the opinion that the trial court would soon have put an end to the calling of such witnesses.

If counsel's position upon this point were sound, one who had destroyed or interrupted a mercantile business, for instance, could not be called upon to pay damages unless the injured party brought in all his customers, who had to buy a yard of calico or a pound of sugar, and had them testify that this failure to buy calico and sugar was due to the injurious act of the person who had destroyed or interrupted the business —and like results would follow in connection with all other lines of business.

Counsel then says, on page 44 of appellant's brief:

> "Under the evidence, as the case went to the jury, the decrease in attendance at defendant's theatres in May 1931-33 might have been caused by any one of many equally possible causes, other than the removal of the plaintiff's equipment."

Counsel complains because the appellee did not affirmatively prove that the depression was not in

any way to blame for the loss of his profits. He also complains because the appellee did not affirmatively prove that the loss of profits was not due to competition or to the use of inferior pictures. He might complain with equal propriety because the appellee did not affirmatively show that the loss of profits was not due to dust-storms, droughts, floods, sun-spots, or to a hundred and one other things that might in some cases cause a loss of profits. But it was not incumbent upon appellee to negative the possible effect of any of these agencies by affirmative proof. This very point was before the Supreme Court of Illinois in the case of *Chapman vs. Kirby*, 49 Ill. 211. In that case the Court used this language:

> "It has long been well recognized law that when deprived of such business by slander, compensation for its loss may be recovered in this form of action. And why not for its loss by this more direct means? And of what does this loss consist, but the profits that would have been made had the act not been performed by appellants? And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less? Nor can we expect that in actions of this character, the precise extent of the damage can be shown by demonstration. But by this means they can be ascertained, with a reasonable degree of certainty."

It will be noted that the Court says:

> "And to measure such damages, the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted, leaving the other party to show that by depression in trade, or other causes, they would have been less?"

The burden of showing that the depression, or any other cause, had any effect upon the matter, therefore rested upon the appellant; nor could it be otherwise. If appellee were called upon to prove that the depression did not affect the situation, he would also be called upon to prove, for the same reason, that no other possible cause had had any effect upon it. A rule such as this would result in compelling the anticipation of one hundred and one defenses that would have no existence in fact. The fact is that appellant did offer evidence by which it attempted to prove that the depression and incoming competition had something to do with a loss of profits, and that the Court gave to the jury an instruction directing them to consider this evidence. The instruction referred to being No. 11-B (Pr. Rec. P. 1016), and that the jury evidently considered all this evidence very carefully. This is evident from the fact that the amounts allowed for lost profits, by the jury, were very much less than the total amount of profits actually lost, as established by the evidence, in dollars and cents.

The case cited by counsel on page 45 of appellant's Brief, *Willis vs. S.M.H. Corporations*, 259 N.Y. 144, has no possible application. The plaintiff in that case was a mere employee who had been discharged. He was not a man who had an established business that had been interrupted. True, part of his remuneration came from his solicitation of members to a Club, but no one would call this an established business.

Counsel then enters into a discussion relating to the weight of the evidence with special reference to App. A. and B., published on page 54 of appellant's brief. While the figures referred to by counsel do not in any way show what counsel contends for, it is unnecessary to make any further reference to this portion of the discussion in appellant's brief. The weight of the evidence is a question for the jury and all this portion of counsel's brief relates to a discussion of the weight of the evidence. To discuss these figures would involve a discussion of all the evidence, explanatory and otherwise, relating to them—this might be interesting but it would not be profitable for it would present nothing that the jury were not called to pass upon.

Appellant's counsel then proceeds to consider the second proposition on page 49 of his Brief, and maintains that defendant has wholly failed to show the amount of his loss of profits, if any, caused by the removal of the plaintiff's equipment. In support of this proposition appellant quotes four and one half

lines from the opinion of the *Central Coal & Coke Company vs. Hartman*, 111 Fed. 96. Immediately following the portion of the opinion quoted by counsel occurs this language:

> "The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly incomes he derives from it for a long time before, and for the time during the interruption of which he complains. The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff had lost."

Had counsel read on until he had read the whole opinion, he would have found that the evidence in this case complies exactly with the requirements of the decision in the case of the *Central Company vs. Hartman*, in which this opinion was rendered.

Counsel refers to the case of *Freidman vs. McKay Leather Co.* 178 Pac. 139, but that case is not in point. That was not an action to recover prospective profits for the interruption of an established business. Even so, however, statements made by the Court in that case are such as to indicate that the Court recognized the fact that where prospective damages can be proved with reasonable certainty, as they can be in a case where an established business is interrupted, such damages are recoverable.

Counsel then again returns to the case of *Central Coal & Coke Company vs. Hartman,* 111 Fed. 96, and quotes another portion of that opinion, including the statement:

> "And the monthly and yearly income he derives from it for a long time before and for the time during the interruption."

Counsel again breaks off his quotation too soon. He cites this authority with a view of showing that it is not sufficient to show what the profits were for a period of two years, and that two years, according to counsel's view, is not a long time, while the Court says "for a long time before;" but if counsel had added a few more lines to his quotation he would have been informed upon the question as to what the quotation meant by the use of the term "for a long time before," for immediately following the word "complains" with which he ends his quotation, occurs the following, "The

interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption." The term "for a long time" therefore means for a few months or years. In the case at bar the exact income for a period of two years was established by appellee not only for a few months but it would be 24 months—many months.

In addition to this, however, there is other evidence in the Record, and it is that appellee had been conducting these theatres for a period of something like 20 years, and that during that entire period there had never been a time these theatres were not profitable and were not paying investments. (Pr. Rec. P. 362)

While the exact amount of profits was only shown for a period of two years, we do not believe that any Court would permit a party to encumber the Record by showing what his exact profits were, from his books, for a period of twenty years, even though the books covering this entire period had been preserved, which would in no case be likely.

On page 53 counsel complains, although there is no exception relating to it, that the Verdict must have been speculative because the jury didn't award the appellee all the damages that he proved; in other words, the total amount proved for Ketchikan and Juneau were in each case much larger than the amount of damages allowed. But counsel forgets that the

Courts permit the party inflicting the injury to introduce evidence of depressions, incoming competition, and of any other fact that would tend to lessen the damages; this is merely evidence allowed in mitigation. If the law permits the party inflicting the injury to offer such evidence, it must follow that the jury have a right to consider it. In this case the jury evidently considered the evidence offered by appellant upon these points, and accordingly reduced the damages that would other wise have resulted. Surely appellant shouldn't complain of that.

Moreover, the Verdict is not objected to on the ground that it was speculative, nor is that point urged by any exception or error assigned anywhere in the Record.

Counsel says that no case could be found to better illustrate the injustice of allowing the jury to mulct a party in large damages. Counsel's position evidently is that appellant should be allowed to lease this equipment, collect the rent for ten years, at the end of two years take it out, keep the equipment and also the advance rent that had been collected, and that if the taking out of the equipment destroyed appellee's business it was just too bad. We do not think that any such doctrine finds any support in the law. It is correct to say that as a general proposition speculative damages cannot be recovered in any case, but this does not mean that damages must be proved to a mathematical

certainty. Damages are allowed for pain and suffering, for injuries depending for their severity upon the uncertain duration of life, for loss of earning power, the value of which must necessarily depend not only upon the duration of life but also upon the opportunities to earn that the future may present, and for one hundred and one other things that are such that the amount of the damages cannot be determined with mathematical exactness, but it must be left to the sound discretion of the jury. And in this case the jury were fully and properly instructed upon speculative damages and the degree of certainty required. All that the law requires is that facts be established from which the jury can establish the amount with a reasonable degree of certainty. The authorities we have cited, establish the fact that the appellee in this case produced evidence of facts that in every way meet this requirement of the law; and counsel has produced no authorities whatever to show that this requirement has not been met.

CONCLUSION

This is not a case where it is assigned as error that the verdict is not sustained by sufficient evidence, or that the verdict is excessive. Indeed, the record shows that the verdict might have been for a much larger amount without being open to either of these objections.

It is important to note at this point that nearly all of the exceptions brought up for review are general in their nature and state no ground of exception at all, and that in those cases where there is an attempt to state grounds of exception, the grounds are stated in such general and uncertain terms that they present nothing for consideration, for the reason that they do not sharply and specifically call the trial court's attention to the error, if any, so that it might be corrected. Indeed, some matters, as we have pointed out, that were discussed by counsel under the six points in appellant's Brief, relate to things that were not excepted to at all. While we have not discussed the facts in this Brief, we think that sufficient has been said to show that the equities in the case are all in favor of appellee, and that the trial judge committed no error, so that the judgment should be affirmed.

Respectfully submitted,

J. A. HELLENTHAL,

H. L. FAULKNER,

Counsel for Appellee.

No. 8092

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

3

In the Matter of
WILLIAM DILLER,

Bankrupt.

WILLIAM DILLER,

Appellant,

vs.

MICHAEL SHOEMAKER, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Names and Addresses of Solicitors.

For Appellant:

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OREGON SMITH, Esq.,

433 South Spring Street,
Los Angeles, California.

For Appellee Michael Shoemaker:

ROBERT MACK LIGHT, Esq.,

440 Court Street, San Bernardino, California.

For Appellees John Hancock Mutual Life Insurance Company and California Trust Company:

BAUER, MACDONALD, SCHULTHEIS & PETTIT, Esqs.,

JOHN L. ROWLAND, Esq.,

621 South Spring Street,
Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of February, A. D. 1936, pursuant to an order allowing appeal of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain proceeding entitled "In the Matter of the Estate of William Diller, Bankrupt", No. 23967-C, wherein William Diller is appellant and you are appellees to show cause, if any there be, why the orders, and each of them, in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, this 10 day of January, A. D. 1936, and of the Independence of the United States, the one hundred and *sixty*

Geo. Cosgrave

U. S. District Judge for the Southern District of California.

(AFFIDAVIT OF SERVICE BY MAIL—1013a C. C. P.)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In the Matter of the Estate of William Diller, Bankrupt	No. 23967-C AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

Dorothy Macey, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 400 Title Insurance Bldg 433 S. Spring St., Los Angeles, California; that on the 16th day of January, 1936, affiant served the within Citation and Order allowing appeal on Michael Shoemaker in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Michael Shoemaker at the office/residence address of said attorney as follows: (Here quote from envelope name and address of addressee.) "Mr. Robert Mack Light, Attorney-at-Law 440 Court Street San Bernardino, California"; and by then sealing said envelope and depositing the same, with

postage thereon fully prepaid, in the United States Post Office at Los Angeles California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Dorothy Macey

Subscribed and sworn to before me this 16th day of January, 1936

[Seal] George A. Judson

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Citation and of order allowing appeal this 16th day of January, 1936. Bauer, Macdonald Schultheis & Pettit by John L. Rowland attorneys for John Hancock Mutual Life Insurance Company and California Trust Company. Filed R. S. Zimmerman, Clerk at 27 min. past 4 o'clock Jan. 17, 1936 P.M. By L. Wayne Thomas, Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

IN THE MATTER OF	:	NO. 8092
WILLIAM DILLER,	:	CITATION
Bankrupt.	:	

UNITED STATES OF AMERICA, SS.

The President of the United States of America,

TO Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation:
GREETINGS:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing appeal of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein William Diller is appellant and you are appellees, to show cause, if any there be, why the orders rendered against said appellant, as in said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. Curtis D. Wilbur, Senior United States Circuit Judge for the Ninth Circuit, this 15th day of January, 1936.

Curtis D. Wilbur
Judge of the United States Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 11 o'clock Mar 30 1936 AM By R B Clifton Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

-o0o-

IN THE MATTER OF THE ESTATE OF WILLIAM DILLER, Bankrupt. : NO. 23967-C : AGREED STATEMENT OF CASE

-o0o-

On September 14, 1934, William Diller, alleging that he was a farmer, filed his petition in the above entitled court under Section 75, Subsections (a) to (r), of the Bankruptcy Act as amended, and prayed proceedings in accordance therewith. Thereafter his proposal for composition or extension which he made to his creditors was not accepted by them and the Conciliation Commissioner on March 4, 1935, filed a certificate that the composition or extension had failed and recommended that William Diller be adjudicated a bankrupt pursuant to Section 75(s) of the Bankruptcy Laws of the United States. On March 4, 1935, William Diller filed his amended petition to be adjudged a bankrupt pursuant to Section 75(s) of the Bankruptcy Laws of the United States, and on March 4, 1935, he was adjudicated a bankrupt under said Section 75(s) and the order of adjudication was filed. The proceedings were duly referred to D. W. Richards, Referee in Bankruptcy of the above entitled court, by the following order:

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

--

IN THE MATTER OF	:	No. 23,967-C in Bankruptcy
		ADJUDICATION
WILLIAM DILLER	:	And Order of Reference
		(Under Section 75-s
Bankrupt.	:	Bankruptcy Act)

At Los Angeles, on March 4, 1935, before said Court in Bankruptcy, the petition of William Diller, debtor in the above entitled matter, that he be adjudged bankrupt under the terms and provisions of Section 75-s of the Bankruptcy Act, and within the true intent and meaning of the Acts of Congress relating to bankruptcy having been heard and duly considered, the said William Diller is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to D. W. Richards, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by section 75-s of the Bankruptcy Act and by all said acts of Congress relating to Bankruptcy; and that the said William Diller shall attend before said referee on March 11, 1935, at his office in San Bernardino, California, at 10 o'clock A.M. and shall submit to such

orders as may be made by said referee or by this court relating to said matter in Bankruptcy.

WITNESS, The Honorable Geo. Cosgrave Judge of said court, and the seal thereof, at Los Angeles, in said District, on March 4, 1935.

R. S. ZIMMERMAN,
Clerk

By Theodore Hocke
Deputy Clerk

(SEAL)

The proceedings continued before such Referee under said subdivision (s) continuously from and after said 4th day of March, 1935, until it was determined by the Supreme Court of the United States on or about the 27th day of May, 1935, that said subdivision (s) was violative of the Constitution of the United States.

After the United States Supreme Court rendered its judgment in Louisville-Joint Stock Land Bank v. Radford, 295 U. S. 555 (May 27, 1935), which held the Frazier-Lemke Act, i. e., subsection (s) of Section 75, in violation of the Constitution of the United States of America, Michael Shoemaker, on June 3, 1935, filed with the aforesaid Referee a motion to dismiss said proceeding upon the ground of the unconstitutionality of said subsection (s) of Section 75, and on the same day, ex parte and without notice to any other party, orally moved such dismissal before such Referee and such Referee on the same day granted such motion so made, but thereafter said William Diller, on June 24, 1935, ex parte and without notice to and without the knowledge of any other party, filed his amended petition praying, first, for a dismissal

of the proceedings insofar as they were affected by the terms and provisions of Subsection (s) of Section 75, and, second, for an extension of time for a period of ninety days within which to attempt to effect a compromise and adjustment of his obligations to his creditors under the terms and provisions of Section 75. Thereafter and on the same day the court duly made and rendered its order dismissing the proceedings insofar as they were affected by the terms and provisions of subsection (s) of Section 75 and granting William Diller an extension of time for a period of ninety days, that is, to and including September 22, 1935, within which to attempt to effect a compromise and adjustment of his obligations to his creditors under the terms and provisions of Section 75.

The debtor failed to effect a composition or extension with his creditors under the provisions of Section 75 (a) to (r) of the Bankruptcy Laws of the United States, and on September 19, 1935, he filed his amended petition to be adjudged a bankrupt under Section 75(s) of the Bankruptcy Laws as amended August 28, 1935, this being the new Frazier-Lemke Act, and on September 21, 1935, said William Diller was adjudicated a bankrupt in accordance with the terms and provisions of Section 75, subsection (s) of the Bankruptcy Laws of the United States, as amended August 28, 1935.

Among the property alleged to be owned by said Diller were two parcels of real property. One parcel was a ranch property consisting of approximately 265 acres, situated in San Bernardino County, California, which property was subject to a first trust deed securing a promissory note upon which the principal unpaid was in the sum of Forty-eight Thousand Dollars ($48,000.00).

Said first trust deed and said promissory note was owned and held, and is now owned and held by Michael Shoemaker. On November 25, 1935, the principal was overdue and interest was delinquent in the sum of Six Thousand Dollars ($6,000.00), and nine-tenths (9/10) of the taxes for 1931-1932 were unpaid, the other one-tenth (1/10) thereof having been paid under the ten (10) per cent per year plan authorized by the State of California. This trust deed was in existence on and prior to September 14, 1934, the date upon which Diller filed his original petition.

The other property consisted of a parcel of real property upon which was built a large house, situated in an exclusive residential district in the City of Los Angeles, County of Los Angeles, State of California, fifty (50) miles from the ranch property. William Diller resided in this property with his family at least a portion of the time. This property was also subject to a first trust deed securing a promissory note in the principal sum of Twenty Thousand Dollars ($20,000.00), with interest at seven (7) per cent per annum. The promissory note was overdue, and no interest thereon had been paid since July 1, 1932. The promissory note and trust deed is now and was at the time and prior to the filing of the debtor's petition, owned and held by John Hancock Mutual Life Insurance Company. California Trust Company is named as trustee in said deed of trust. John Hancock Mutual Life Insurance Company has advanced taxes upon the property for the years commencing 1931-1932, to and including 1933-1934. It also advanced insurance premiums in order to keep the property insured. No payment of interest has been made since July 1, 1932. As of November 25, 1935, delinquent interest and advances made by the creditor amounted to Seven Thousand Four Hundred Thirty-four Dollars and Six Cents ($7,434.06),

which together with the principal amount of the debt made a total debt of Twenty-seven Thousand Four Hundred Thirty-four Dollars and Six Cents ($27,434.06). Taxes for the year 1934-1935 have not been paid.

Each of the above described deeds of trust is in the customary California form providing for sale by the trustee upon default in the payment of sums secured thereby at the demand of the owner and holder thereof, but neither of said deeds of trust provides for the appointment of a receiver. Each of said deeds of trust had been executed prior to the institution of any of the proceedings described herein.

Among other things, the Shoemaker deed of trust provided as follows:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition and repair; (b) not to remove or demolish any building thereon; (c) to complete in good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a timely and proper manner, which, from the character or use of said property, may be reasonably neces-

sary to protect and preserve said security, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The amount collected under any fire insurance policy shall be credited first, to accrued interest; next, to expenditures hereunder and any remainder upon the principal, and interest shall thereupon cease upon the amount so credited upon principal; provided, however, that at option of Beneficiary, the entire amount so collected or any part thereof may be released to Trustor, without liability upon Trustee for such release.

3. To appear in and defend any action or proceeding purporting to affect the security of the Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay before default or delinquency; (a) all taxes, assessments or incumbrances (including any debt secured by Deed of Trust), which appear to be prior liens or charges upon said property or any part thereof, including assessments on appurtenant water stock and any accrued interest, cost or penalty thereon; (b) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connection with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale as hereinafter provided.

5. To pay within thirty days after expenditure, without demand, all sums expended by Trustee or Beneficiary under the terms hereof, with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or do any act, which he is obligated hereunder to make or do, at the time and in the manner herein provided, then Trustee, and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof;

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or *a*against Trustor, Trustee, or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of such attorney's fees is hereby secured.

. . . . .

I. This Deed of Trust in all its parts applies to, inures to the benefit of, and binds all parties hereto, their heirs,

legatees, devisees, administrators, executors, successors and assigns.

Among other things, the John Hancock Mutual Life Insurance Company's deed of trust provided as follows:

A. Trustor promises and agrees, during continuance of these Trusts:

1. For the purpose of protecting and preserving the security of this Deed of Trust: (a) to properly care for and keep said property in good condition and repair; (b) not to remove or demolish any building thereon; (c) to complete in good and workmanlike manner any building which may be constructed thereon, and to pay when due all claims for labor performed and materials furnished therefor; (d) to comply with all laws, ordinances and regulations requiring any alterations or improvements to be made thereon; (e) not to commit or permit any waste or deterioration thereof; (f) not to commit, suffer or permit any act to be done in or upon said property in violation of any law or ordinance; (g) to cultivate, irrigate, fertilize, fumigate, prune and/or do any other act or acts, all in a timely and proper manner, which, from the character or use of said property, may be reasonably necessary to protect and preserve said security, the specific enumerations herein not excluding the general.

2. To provide fire and earthquake insurance satisfactory to, and with loss, if any, payable to said Beneficiary, and to have such insurance written by such agent in such insurance companies as the Beneficiary may designate; it being agreed that in the event of a loss, the amount collected under any policy of insurance on said property may, at the option of said Beneficiary, be credited first upon any advances secured hereby, next upon interest due, if any, upon said indebtedness, and the remainder, if any,

upon the principal sum then secured hereby, and interest shall thereupon cease upon the amount so credited upon said principal sum; or, said amount, or any portion thereof, may be released to said Trustor for the purpose of making repairs or improvements upon said property, in which event neither said Trustee nor said Beneficiary shall be obligated to see to the proper application thereof, nor shall the amount so released be deemed a payment on any indebtedness secured hereby.

3. To appear in and defend any action or proceeding purporting to affect the security of this Deed of Trust, the interest of Beneficiary or the rights, powers and duties of Trustee hereunder; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in any such action or proceeding in which Beneficiary and/or Trustee may appear.

4. To pay before default or delinquency: (a) all taxes, assessments or incumbrances (including any debt secured by Deed of Trust), which appear to be prior liens or charges upon said property or any part thereof, including assessments on appurtenant water stock, and any accrued interest, cost or penalty thereon; (b) all costs, fees and expenses of these Trusts, including cost of evidence of title and Trustee's fees in connection with sale, whether completed or not, which amounts shall become due upon delivery to Trustee of Declaration of Default and Demand for Sale, as hereinafter provided.

5. To pay within thirty days after expenditure, without demand all sums expended by Trustee or Beneficiary, under the terms hereof, with interest from date of expenditure at the rate of ten per cent per annum.

B. Should Trustor fail or refuse to make any payment or do any act which he is obligated hereunder to make or

do, at the time and in the manner herein provided, then Trustee and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor, and without releasing Trustor from any obligation hereof:

1. Make or do the same in such manner and to such extent as may be deemed necessary to protect the security of this Deed of Trust, either Trustee or Beneficiary being authorized to enter upon and take possession of said property for such purposes.

2. Commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary; or

3. Pay, purchase, contest or compromise any prior claim, debt, lien, charge or incumbrance which in the judgment of either may affect or appear to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder.

Provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of an attorney is authorized and payment of such attorney's fees is hereby secured.

. . . . . .

I. This Deed of Trust in all its parts, except as herein otherwise provided, applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns.

William Diller's proposal for a composition or extension, made on or about September 18, 1935, offered to

pay the sum of Forty-six Thousand Five Hundred Fifty Dolars ($46,550.00) in satisfaction of the Michael Shoemaker promissory note and trust deed, and offered to pay the sum of Twenty-one Thousand Six Hundred Ten Dollars ($21,610.00) in satisfaction of the John Hancock Mutual Life Insurance Company promissory note and trust deed, said sums being the values placed upon the respective properties by appraisers appointed in the proceedings.

On July 24, 1935, Michael Shoemaker filed his petition to dismiss the proceedings, or in the alternative for an order permitting Michael Shoemaker to foreclose the trust deed. Said petition was based upon the following grounds:

(1) That the debtor, having voluntarily terminated proceedings under subdivisions (a) to (r) of Section 75 of the Bankruptcy Act, left the court with no jurisdiction in the premises.

(2) That the proceedings have been and were then being prosecuted in bad faith and without any intent to make a composition, or any expectation of making a composition, but solely for the purpose of hindering, delaying and defrauding said creditor.

(3) That said debtor was not a farmer within the meaning of Section 75.

(4) That the court had no jurisdiction to make the order which it made on June 24, 1935, extending the time for an attempt to effect a composition or extension.

(5) That the relation of debtor and creditor did not exist between Diller and Michael Shoemaker for the reason that said William Diller had not assumed the payment of the promissory note secured by said trust deed held by said Shoemaker.

On July 25, 1935, John Hancock Mutual Life Insurance Company and California Trust Company filed their petition for order to show cause why an order should not be made permitting the sale of real property under deed of trust. Said petition was based upon the following grounds:

(1) That the indebtedness owned by said petitioner John Hancock Mutual Life Insurance Company was not an indebtedness incident to or arising out of the farming or agricultural operations of the debtor; that it was not incident to or necessary for the farming operations of the debtor; that the property situated in the City of Los Angeles did not fall within the terms and provisions of Section 75 of the Bankruptcy Laws of the United States.

(2) That there was no equity in the property over and above the amount of the principal and interest due upon the promissory note.

(3) That said debtor was not a farmer within the meaning of Section 75 of the Bankruptcy Act.

(4) That in bad faith and with the sole and only purpose of attempting to bring the property within the provisions of the Bankruptcy Act, authorizing him to attempt to effect a composition or extension with his creditors, the wife of William Diller had conveyed her interest in said property to Diller one or two days prior to September 14, 1934, the date upon which the debtor had filed his original petition.

The hearing on the order to show cause of John Hancock Mutual Life Insurance Company and upon the petition of Michael Shoemaker was continued until September

5, 1935, upon which date a hearing was held, after which the motion of Michael Shoemaker to dismiss was ordered denied and the application of John Hancock Mutual Life Insurance Company and the motion of Michael Shoemaker for leave to foreclose, were denied without prejudice to their renewal upon the same petitions at the expiration of thirty days. Thereafter, on September 21, 1935, William Diller was adjudicated a bankrupt under Section 75, subsection (s), as amended August 28, 1935.

On November 19, 1935, John Hancock Mutual Life Insurance Company and California Trust Company renewed their petition for order to show cause why an order should not be made permitting the sale of real property under deed of trust upon the following grounds, in addition to those theretofore set forth in their prior petition:

(1) That the proceedings for a composition or extension with his creditors had failed;

(2) That the debtor had no reasonable hope or ability to pay the debt;

(3) That subsection (s) of Section 75 of the Bankruptcy Act as amended August 28, 1935, was in violation of the Constitution of the United States of America.

On or about the same day Michael Shoemaker filed a supplement to petition to dismiss or for leave to foreclose, upon the following grounds, in addition to those set forth in his original petition:

That subsection (s) of Section 75 of the Bankruptcy Laws of the United States as amended August 28, 1935,

was in violation of the Constitution of the United States of America.

Throughout the proceedings hereinbefore set forth William Diller, the debtor, was represented by Messrs. Willcox & Judson and Oregon Smith, Esq.; Michael Shoemaker was represented by Robert Mack Light, Esq.; and John Hancock Mutual Life Insurance Company and California Trust Company were represented by Messrs. Bauer, Macdonald, Schultheis & Pettit and John L. Rowland, Esq.

On November 25, 1935, a hearing was had before the Honorable Geo. Cosgrave, United States District Judge, upon said petitions and motions. Evidence was offered and received, and it appeared that although the debtor, William Diller, had been interested in farming for some time, he was largely interested in commercial enterprises and subdividing, at least up to the time the latter became unprofitable. Evidence was offered and received upon all the issues raised by said motions and petitions. Evidence was also offered and received concerning the condition of the ranching property and concerning the condition of the residence property situated in the City of Los Angeles. It was admitted that the respective debts had not been paid and that the defaults as set forth above existed. It was also admitted that appraisers appointed by the court in these proceedings had appraised the properties at the respective amounts set forth above. Argument of the respective counsel was heard by the court, the cause was submitted, and thereafter on December 13, 1935, the court having elected to place its decision solely upon the issue

of the constitutionality of said subsection (s), an order was entered by the Honorable Geo. Cosgrave dismissing the proceedings upon the ground that subsection (s) of Section 75 of the Bankruptcy Act, as amended August 28, 1935, was in violation of the Constitution of the United States of America, and thereafter on the 4th day of January, 1936, a formal judgment of dismissal of the within proceeding was signed and filed by the Honorable Geo. Cosgrave, United States District Judge for the Southern District of California, Central Division. That an exception was duly made by the bankrupt to the rendition of each of said orders, and was duly noted and granted by said court.

The within is and may be treated as a statement of the within case showing how the questions herein arose and were tried in the United States District Court for the Southern District of California, Central Division, setting forth so much only of the facts alleged and proved herein as is essential to a decision of said questions by the United States Circuit Court of Appeals for the Ninth Circuit, and is made pursuant to Rule 77 of the Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States. As such, the within statement when filed in the office of the clerk of said United States District Court may be treated as superseding, for the purposes of the within appeal, all parts of the record in the within matter other than the above mentioned orders of said United States District Court made the 13th day of December, 1935, and the 4th day of January, 1936, and, together with said orders,

may be copied and certified to Circuit Court of Appeals as the record on appeal herein.

Dated the 29 day of February, 1936.

WILLCOX & JUDSON

By Oregon Smith
Attorneys for Bankrupt

Robert Mack Light
Attorney for Michael Shoemaker

BAUER, MACDONALD, SCHULTHEISS & PETTIT

By John L. Rowland

Attorneys for John Hancock Mutual Life Insurance Company and California Trust Company

The preparation and filing of the above as an agreed statement of the within case, superseding, for the purposes of the appeal herein, all parts of the record of the within case other than the above mentioned orders from which said appeal is taken, is hereby approved, and said agreed statement of the case and said orders may and they shall be copied and certified to the Circuit Court of Appeals for the Ninth Circuit as the record on appeal herein.

Dated this 30 day of March, 1936.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 40 min. past 11 o'clock Mar. 30, 1936 A. M. By F. Betz, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 23967-C

DECISION

COSGRAVE, District Judge.

William Diller, stating that he was a farmer, filed his petition on September 14, 1934, under Section 75 of the Bankruptcy Act, and prayed proceedings in accordance therewith.

After various proceedings under Section 75 and 75-s, as existing originally, that need not be described in this memorandum, he has secured adjudication under Section 75-s as it now exists. (Bankruptcy Act, Section 75-s, approved August 28, 1935).

A petition to dismiss the debtor's proceeding, or in the alternative to permit the foreclosure of a trust deed covering the farming property, was filed by Michael Shoemaker, the owner of the trust deed. Another petition to permit the foreclosure of a trust deed on property of the debtor, other than his farming property, has been filed by the John Hancock Mutual Life Insurance Company and a hearing was had and evidence taken in support of the two petitions.

At this hearing it was shown that the debtor lives with his family in an exclusive residence district in the City of Los Angeles, fifty miles from his farm, which is in another county. Although interested in farming for some time, he was largely interested in commercial enterprises, and subdividing, at least up to the time the latter became unprofitable.

The trust deed held by the John Hancock Mutual Life Insurance Company secures a note for the principal sum of $20,000, with interest at seven per cent per annum, and covers the debtor's residence in the City of Los Angeles. The note is overdue and no interest has been paid since July 1, 1932. The life insurance company has advanced taxes for two years and insurance premiums to keep the property insured, the debtor having made default in such particulars. Taxes for 1934-1935 are delinquent, the company having declined to make such payments. Delinquent interest and taxes amount to $7434.06. In the proceedings first above referred to the property was appraised at $21,610.00.

The Michael Shoemaker trust deed secures a note for $48,000 principal, now overdue, together with $6000 delinquent interest and a considerable portion of the delinquent taxes for 1931-1932. Subsequent taxes it appears have been paid. It covers the farming land consisting of several hundred acres which was appraised by appraisers under the previous proceedings at $46,500. Both trust deeds were in existence at the time of the amendment to the Bankruptcy Act.

Petitioners in both cases urge the unconstitutionality of the Act on which the proceedings are based, a question probably pending in every district in the United States, but decided, so far as can be readily determined in the few hereinafter referred to. Due to the great number of cases here where the question is presented an early decision is imperative.

Under the present Act, (Bankruptcy Act, Section 75, sub. s, approved August 28, 1935), the farmer petitions that all of his property be appraised and he be allowed to

retain possession of it under the terms of the Act. It is then appraised at its fair and reasonable market value and (sub. 1) after his unincumbered exemptions are set aside to him the possession, under the supervision and control of the court, of part or all of the remainder of his property remains in him subject to all existing mortgages. Thereafter (sub. 2) for a period of three years all judicial or official proceedings are stayed and the debtor is permitted to retain possession of his property upon payment of a reasonable rental. The court may require payments on the principal, having in mind among other things his financial rehabilitation. The rental is first devoted to the upkeep of and payment of taxes upon the property.

At the end of three years (sub. 3), or during that time, the debtor may pay into the court the amount of the appraisal of the property and thereupon the court shall turn over full possession and title of the property free of incumbrances to the debtor. In the meantime upon the request of any creditor the court must cause a reappraisal of the property to be made and the debtor must pay the reappraised value. It is provided, however, that at the written request of any secured creditor the property shall be sold at public auction.

The Act seems to be somewhat ambiguous as to when this right last mentioned shall be exercised. Included as a qualification of the positive provision that the debtor may at any time during the three years pay the appraised value of the property and take it free of incumbrance, the effect to be given to the clause undoubtedly is that the secured creditor can exercise such right at the time that the debtor proposes to pay the appraised value; this may be during or at the end of the three years. This view

is made more certain by the language of the provision in subdivision 2 that the courts shall stay all proceedings for a period of three years, during which time the debtor is allowed to retain possession of his property.

The Act therefore provides that the property subject to the lien shall be appraised and the debtor given possession of it for a period of three years upon payment of a reasonable rental and all proceedings against him stayed. This rental is applied first to the payment of the taxes and upkeep of the property and the remainder given to the secured creditor. At any time within three years the debtor may pay the appraised value of the property and receive it free of the incumbrance. Whenever this action is proposed the creditor may demand that the property be sold at public auction.

The decision of the United States Supreme Court in Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555, condemns the former Frazier-Lemke Act (Bankruptcy Act, Section 75-s, as existing May 27, 1935) because its effect was to deny to the bank the following specifically described rights.

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the

proceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

There is nothing in the decision indicating that this enumeration is exclusive of other rights, or any suggestion of relative value among those described.

It may be conceded that under the new Act the lien-holder retains the lien until the indebtedness is paid because he may finally demand a sale at public auction. We might also concede that for the same reason the right numbered two in the opinion of the Supreme Court, being to realize upon the security by a judicial public sale, is also preserved. The new Act, however, distinctly deprives the lien-holder the right numbered three, that is to determine when the sale shall be had, subject only to the discretion of the court. On the contrary this right is postponed for three years or for a shorter time at the pleasure of the debtor and not the lien-holder. The language of the Supreme Court in Louisville Joint Stock Land Bank vs. Radford, supra, upon this point is plain:

"Equally unfounded is the contention that the mortgagee is not injured by the denial of possession for the five years, since it receives the rental value of the property . . . Radford's argument ignores the fact that in ordinary bankruptcy proceedings and in equity receiverships,

the court may in its discretion, order an immediate sale and closing of the estate; and it ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress. When a court of equity allows a receivership to continue, it does so to prevent a sacrifice of the creditor's interest. Under the Act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee." (596.)

A period of redemption of three months is also given which deprives the owner of the trust deed of a property right. Rights created under trust deeds, such as are involved in this case, have long been an established rule of property in California (Sacramento Bank vs. Alcorn, 121 Cal. 379, 25 Cal. Jur. 8). On this subject the Circuit Court of Appeals of the Seventh Circuit in an opinion written by Circuit Judge Sparks on November 15, 1935, says:

"We think that in thus extending or tolling the period of redemption for three years beyond that fixed by state statutes, Congress exceeded the powers conferred upon it under the bankruptcy clause of the Constitution."

and further:

"We think there is nothing in the constitutional clause conferring upon Congress the control over bankruptcy (authorizing the passage of bankruptcy laws) which authorizes it to change property rights already created by the states."

–In re Loman, et al ..... Federal Reporter, 2d .....

It might be conceded that the right numbered four is preserved.

Right numbered five, however, is distinctly destroyed. The control of the property during the period of default is given not to the lien-holder but to the debtor, as also are the rents and profits. It is true that the Act provides (sub. 1) that liens shall remain in full force and effect. This fair assurance is forthwith made entirely hollow by the specific provisions above referred to and is without substance.

Conceding the utmost therefore to the new Act, it is plain that the rights numbered three and five in the Supreme Court's opinion are denied the lien-holder under it to the same extent as under the original Act. The lien-holder is deprived of substantive rights without compensation in violation of the Constitution. The Act must therefore be held invalid.

The question has already been considered in three careful and instructive opinions by district courts; by Judges Briggle and Major of the Southern District of Illinois, In Re Young, on October 21, 1935, 12 Fed. Supp. 30; by Judge Paul of the Western District of Virginia, In Re Sherman, on November 8, 1935; and by Judge Scott of the Northern District of Iowa, on November 28, 1935; although with some doubt a contrary opinion has been expressed by Judge Atwell of the Northern District of Texas, on October 12, 1935, in the Matter of Slaughter.

In re Loman, the case above referred to, decided by the Circuit Court of Appeals of the Seventh Circuit, a certificate of sale on mortgage foreclosure had been issued on August 5, 1933, the purchaser being entitled to a deed on August 5, 1934. On July 23, 1934, the petition of the debtor was filed. The district court enjoined the execution and delivery of the deed, but this ruling was reversed by the Circuit Court. While it is true the case is not a parallel of the present case, and it might be urged is authority only where a similar state of facts exists, the reasoning of the court and its conclusion above quoted are entirely applicable.

For the reasons given the bankruptcy proceeding should be dismissed and it is so ordered.

Exception to the debtor.

December 13, 1935.

[Endorsed]: Filed Dec 13, 1935 5 P. M. R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

IN THE MATTER OF THE ESTATE)
OF WILLIAM DILLER,) No. 23967-C
Bankrupt.)

JUDGMENT OF DISMISSAL

The petition of Michael Shoemaker to dismiss proceedings or in the alternative for an order permitting him to foreclose his deed of trust, duly came on for hearing before the above entitled Court, the Honorable George Cosgrave, United States District Judge, Judge Presiding, on November 25, 1935. Robert Mack Light, Esq., appeared as attorney for petitioner. At the same date and hour and before the same Court and Judge, the petition of John Hancock Mutual Life Insurance Company and California Trust Company, for an order permitting sale of real property under deed of trust duly came on for hearing. Messrs. Bauer, Macdonald, Schultheis & Pettit and John L. Rowland, Esq., appeared as attorneys for petitioners John Hancock Mutual Life Insurance Company and California Trust Company. Messrs. Willcox & Judson and Oregon Smith, Esq., appeared as attorneys for the bankrupt, William Diller.

The two petitions were heard on said day, evidence both oral and documentary was offered and received in support of said petitions and in opposition thereto, argu-

ment was heard by the Court and said petitions were submitted to the Court for decision. Said petitions were presented upon the ground, among others, that subsection S of Section 75 of the Bankruptcy Laws of the United States as amended by Act of Congress, August 28, 1935, was and is in violation of the Constitution of the United States of America. It appeared to the Court, and the Court so finds, that said Michael Shoemaker is, and throughout the pendency of these proceedings he has been, the owner and holder of a deed of trust upon certain real property standing of record in the name of the above named bankrupt located within the State and Southern District of California securing sundry indebtednesses including unpaid principal in the sum of Forty-eight Thousand Dollars ($48,000.00) evidenced by a certain promissory note described in said deed of trust; that said John Hancock Mutual Life Insurance Company is, and throughout the pendency of these proceedings it has been, the owner and holder of a deed of trust upon certain real property standing of record in the name of the above named bankrupt located within the State and Southern District of California securing sundry indebtednesses including unpaid principal in the sum of Twenty Thousand Dollars ($20,000.00), evidenced by a certain promissory note described in said deed of trust; that due notice of the presentation of said petitions and of each of them was given as provided by law, and by the rules of this Court; that said petitions and each of them came on regularly for hearing; that on the 18th day of September,

1935, a proposal for compensation and extension made by said Diller to his creditors was not accepted by them; that thereafter and on or about the 21st day of September, 1935, said William Diller was adjudicated a bankrupt in accordance with the terms and provisions of subsection S of Section 75 of the Bankruptcy Laws of the United States, as amended; and the Court being fully advised in the premises and it appearing to the Court, and the Court so holds, that subsection S of Section 75 of the Bankruptcy Laws of the United States as amended by Act of Congress, August 28, 1935, is in violation of the Constitution of the United States of America and accordingly the relief prayed for in said petitions should be granted and the within proceedings should be dismissed.

NOW, THEREFORE, upon the motion of said Robert Mack Light, Esq., attorney for Michael Shoemaker, and upon the motion of Messrs. Bauer, Macdonald, Schultheis & Pettit, and John L. Rowland, Esq., attorneys for John Hancock Mutual Life Insurance Company and California Trust Company,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) That the above entitled proceedings be and they are hereby dismissed both as proceedings under subsections A to R, inclusive, of Section 75 of the Bankruptcy Laws of the United States of America and as proceedings under subsection S of Section 75 of the Bankruptcy Laws of the United States of America, and in this latter behalf

both as proceedings under the original subsection S of said Section 75, and as proceedings under said subsection S as amended by Act of Congress on the 28th day of August, 1935; and

(2) That the pendency of these proceedings at whatever stage thereof shall not be construed as and shall not constitute a bar or impediment to the effectiveness or effect of any act or step taken by the holder or holders of any note or notes secured by a deed or deeds of trust or mortgage upon any of the property claimed to be a part of the estate of said bankrupt or debtor taken by or on behalf of the holder or holders of any such note or notes in connection with the foreclosure or sale under any such deed of trust or mortgage, and all such steps and acts shall be as fully effective as though the within proceedings had never been instituted.

Done in open Court this 4th day of January, 1936.

GEO. COSGRAVE
United States District Judge

APPROVED AS TO FORM AS PROVIDED IN RULE 44:

WILLCOX & JUDSON
Attorneys for William Diller.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 27 min. past 11 o'clock Jan-4, 1936 A. M. By F Betz, Deputy Clerk.

[Title of Court and Cause.]

No. 23967-C

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable District Court of the United States for the Southern District of California, Central Division, and the Honorable Geo. Cosgrave, Judge thereof:

The undersigned William Diller, the bankrupt herein, conceiving himself aggrieved by a certain order of the United States District Court for the Southern District of California, Central Division, made the 13th day of December, 1935, of which the following is a copy, to-wit:

[Omitted for the sake of brevity, but set forth heretofore in record.]

And conceiving himself aggrieved by a certain other and different order of said United States District Court made the 4th day of January, 1936, of which the following is a copy, to-wit:

[Omitted for the sake of brevity, but set forth heretofore in record.]

does hereby petition for the allowance of an appeal from said orders, and each of them, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that such appeal may be allowed, and that a citation issue as provided by law directed to Michael

Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, citing and admonishing them, and each of them, to appear before the United States Circuit Court of Appeals for the Ninth Circuit to show cause, if any there be, why the errors in the above mentioned orders should not be corrected and speedy justice should not be done to the parties in that behalf, and that a transcript of the record and evidence of the proceeding in which the above mentioned orders were made be sent, duly authenticated, to said Circuit Court of Appeals pursuant to the rules of said court in such cases made and provided.

Dated this 9th day of January, 1936.

William Diller
Bankrupt

WILLCOX & JUDSON

By Oregon Smith
Attorneys for Bankrupt

STATE OF CALIFORNIA)
(SS.
County of Los Angeles)

William Diller, being by me first duly sworn, deposes and says: that he is the bankrupt and petitioner in the above entitled matter; that he has read the foregoing petition for allowance of appeal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

William Diller

Subscribed and sworn to before me this 9 day of January, 1936.

[Seal] George A. Judson
Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Received copy of the within document Jan 9-1936 Bauer Macdonald Schultheis & Pettit. Per M. G. Filed R. S. Zimmerman, Clerk at 4 min past 5 o'clock Jan-9, 1936 P. M. By L. Wayne Thomas, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

—oOo—

IN THE MATTER OF	:	No. 23967-C
WILLIAM DILLER,	:	ASSIGNMENT OF ERRORS
Bankrupt.	:	

—oOo—

Comes now William Diller, the bankrupt herein, and in connection with his appeal from an order of the United States District Court for the Southern District of California, Central Division, made and dated the 13th day of December, 1935, complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in holding that the existing subsection (s) of Section 75 of the Bankruptcy Act deprives secured creditors of the above named bankrupt, and more particularly Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, of substantive rights without compensation, in violation of the Constitution of the United States of America, and is therefore invalid.

2. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right to determine when a sale of such property shall be held after default made by the bankrupt in the payment of obligations secured by said deeds of trust, subject to the discretion of the court; and the court erred in holding that such right is postponed for three years or for a shorter time at the pleasure of the debtor and not the holder of such deeds of trust.

3. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right, pending such sale and during the period of such default, subject only to the discretion of the court, to have the rents and profits from such real property collected by a receiver for the satisfaction of said obligations, and to control said property.

4. The court erred in holding that the period of redemption allowed by said subsection (s), after the sale of real property of the bankrupt at public auction at the request of a creditor holding a deed of trust thereon, deprives the holder of such deed of trust of a property right.

5. The court erred in ordering the dismissal of the within bankruptcy proceeding.

In connection with the appeal from another order of said United States District Court made and dated the 4th day of January, 1936, rendered as a formal order supplementing the above mentioned order of December 13, 1935, and based upon the same petitions and pleadings as those upon which the above mentioned order of December 13, 1935, was founded, said bankrupt complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in decreeing that said subsection (s) was and is in violation of the Constitution of the United States of America, and that accordingly the relief prayed for in said petitions should be granted and the within proceedings should be dismissed.

2. The court erred in decreeing the above entitled proceedings dismissed, both as proceedings under subsections (a) to (r), inclusive, of Section 75 of the Bankruptcy Act and as proceedings under subsection (s) of said Section 75, and both as proceedings under the original subsection (s) of Section 75 and as proceedings under the existing subsection (s) of said section.

3. The court erred in decreeing that the pendency of these proceedings at whatever stage thereof shall not be construed as and shall not constitute a bar or impediment to the effectiveness or effect of any act or step taken by the holder or holders of any note or notes secured by a deed or deeds of trust or mortgage upon any of the prop-

erty claimed to be a part of the estate of said bankrupt, taken by or on behalf of the holder or holders of any such note or notes in connection with the foreclosure or sale under any such deed of trust or mortgage, and that all such steps and acts should be as fully effective as though the within proceedings had never been instituted.

WHEREFORE said William Diller prays that said orders, and each of them, be reversed and the within cause remanded to the United States District Court for the Southern District of California, Central Division, with instructions to reverse said orders, and each of them.

WILLCOX & JUDSON

By Oregon Smith

Attorneys for appellant, William Diller.

[Endorsed]: Received copy of the within document Jan 9-1936 Bauer Macdonald Shultheis & Pettit per Mg. Filed R. S. Zimmerman, Clerk at 4 min. past 5 o'clock Jan-9, 1936 P. M. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

No. 23967-C

ORDER ALLOWING APPEAL

Upon reading and filing the assignment of errors and petition for allowance of appeal of William Diller, the bankrupt herein, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the orders, and each of them, referred to in said petition and made the 13th day of December, 1935, and the 4th day of January, 1936, by the United States District Court for the Southern District of California, Central Division, shall be and it hereby is allowed, conditioned, however, upon the giving of a cost bond in the sum of $250.00 within ten days from date hereof.

Dated this 10 day of January, 1936.

Geo. Cosgrave
United States District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 40 min. past 2 o'clock Jan 10 1936 P. M. By L. Wayne Thomas Deputy Clerk.

[Title of Court and Cause.]

No. 23967-C

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, William Diller, as principal, and Willa Buchan and Florence C. Diller, as sureties, do hereby jointly and severally undertake and promise on the part of appellant that said appellant will pay all damages and costs which may be awarded against him on appeal herein, or on a dismissal thereof, to an amount not exceeding the sum of $250.00, to which sum we hereby acknowledge ourselves bound.

AND, WHEREAS, appellant has filed an appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, the undersigned appellant and sureties, and each of them, submitting themselves to the jurisdiction of said court, do hereby jointly and severally acknowledge themselves bound unto whom it may concern in the sum of $250.00, to the effect that they will pay all costs and expenses which may be awarded against the appellant in said case by the final decree of said court or upon appeal, and consent that in the event of the default or contumacy of said appellant, execution may issue against them, their goods, lands and chattels, for the amount of this undertaking.

Dated this 17th day of January, 1936.

William Diller
Principal—Appellant
Willa Buchan
Surety
Florence C. Diller
Surety

SOUTHERN DISTRICT OF CALIFORNIA)
STATE OF CALIFORNIA (ss.
COUNTY OF LOS ANGELES)

Willa Buchan and Florence C. Diller, being first duly sworn, each for herself deposes and says:

That they, and each of them, are residents, householders and free-holders within the Southern District of California, Central Division, and worth the amount specified in the above and foregoing bond over and above all their just debts and liabilities exclusive of property exempt from execution.

Willa Buchan

Subscribed and sworn to before me this 17th day of January, 1936.

[Seal] George A. Judson
Notary Public in and for the County of Los Angeles, State of California

Florence C. Diller

Subscribed and sworn to before me this 17th day of January, 1936.

[Seal] George A. Judson
Notary Public in and for the County of Los Angeles, State of California.

Examined and recommended for approval as provided in Rule 28.

Oregon Smith
Attorney

I hereby approve the foregoing bond this 20 day of January, 1936.

Geo. Cosgrave
United States District Judge

SOUTHERN DISTRICT OF CALIFORNIA)
STATE OF CALIFORNIA (ss.
COUNTY OF LOS ANGELES.)

On this 17th day of January, 1936, before me, George A. Judson, a Notary Public in and for said County and State, personally appeared William Diller, Willa Buchan and Florence Diller, known to me to be the persons whose names are subscribed to the within bond for costs on appeal, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] George A. Judson
Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 50 min. past 9 o'clock Jan. 20, 1936 A. M. By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 8092

PETITION FOR ALLOWANCE OF APPEAL

To the Honorable Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Judges thereof:

The undersigned William Diller, the bankrupt herein, conceiving himself aggrieved by a certain order of the United States District Court for the Southern District of California, Central Division, made the 13th day of December, 1935, of which the following is a copy, to-wit: (omitted for the sake of brevity but set forth elsewhere in full, at pages 23 to 30).

And conceiving himself aggrieved by a certain other and different order of said United States District Court made the 4th day of January, 1936, of which the following is a copy, to-wit: (omitted for the sake of brevity but set forth elsewhere in full, at pages 31 to 34),

does hereby petition for the allowance of an appeal from said orders, and each of them, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that such appeal may be allowed, and that a citation issue as provided by law directed to Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, citing and admonishing them, and each of them, to appear before the United States Circuit Court of Appeals for the Ninth Circuit to show cause,

if any there be, why the errors in the above mentioned orders should not be corrected and speedy justice should not be done to the parties in that behalf, and that a transcript of the record and evidence of the proceeding in which the above mentioned orders were made be sent, duly authenticated, to said Circuit Court of Appeals pursuant to the rules of said court in such cases made and provided.

Dated this 9th day of January, 1936.

William Diller
WILLIAM DILLER
Bankrupt

WILLCOX & JUDSON
By Oregon Smith
Attorneys for Bankrupt

STATE OF CALIFORNIA) SS.
(
County of Los Angeles)

William Diller being by me first duly sworn, deposes and says: That he is the bankrupt and petitioner in the above entitled matter, that he has read the foregoing petition for allowance of appeal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

William Diller
WILLIAM DILLER

Subscribed and sworn to before me this 9 day of January, 1936.

[Seal] George A Judson
Notary Public in and for the County of Los Angeles, State of California

(Endorsed) Petition for allowance of appeal. Filed January 10, 1936. Paul P O'Brien, Clerk.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min. past 10 o'clock Mar 30 1936 A M By R B Clifton Deputy Clerk

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

–oOo–

IN THE MATTER OF	:	No. 8092
WILLIAM DILLER,	:	ASSIGNMENT OF
Bankrupt.	:	ERRORS

–oOo–

Comes now William Diller, the bankrupt herein, and in connection with his appeal from an order of the United States District Court for the Southern District of California, Central Division, made and dated the 13th day of December, 1935, complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in holding that the existing subsection (s) of Section 75 of the Bankruptcy Act deprives secured creditors of the above named bankrupt, and more particularly Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, of substantive rights without compensation, in violation of the Constitution of the United States of America, and is therefore invalid.

2. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of

said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right to determine when a sale of such property shall be held after default made by the bankrupt in the payment of obligations secured by said deeds of trust, subject to the discretion of the court; and the court erred in holding that such right is postponed for three years or for a shorter time at the pleasure of the debtor and not the holder of such deeds of trust.

3. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right, pending such sale and during the period of such default, subject only to the discretion of the court, to have the rents and profits from such real property collected by a receiver for the satisfaction of said obligations, and to control said property.

4. The court erred in holding that the period of redemption allowed by said subsection (s), after the sale of real property of the bankrupt at public auction at the request of a creditor holding a deed of trust thereon, deprives the holder of such deed of trust of a property right.

5. The court erred in ordering the dismissal of the within bankruptcy proceeding.

In connection with the appeal from another order of said United States District Court made and dated the 4th day of January, 1936, rendered as a formal order supplementing the above mentioned order of December 13, 1935, and based upon the same petitions and pleadings as those upon which the above mentioned order of December 13, 1935, was founded, said bankrupt complains and says that in the record and proceedings of said court and in said order itself manifest errors have intervened to the prejudice of said bankrupt of which he makes the following assignments, to-wit:

1. The court erred in decreeing that said subsection (s) was and is in violation of the Constitution of the United States of America, and that accordingly the relief prayed for in said petitions should be granted and the within proceedings should be dismissed.

2. The court erred in decreeing the above entitled proceedings dismissed, both as proceedings under subsections (a) to (r), inclusive, of Section 75 of the Bankruptcy Act and as proceedings under subsection (s) of said Section 75, and both as proceedings under the original subsection (s) of Section 75 and as proceedings under the existing subsection (s) of said section.

3. The court erred in decreeing that the pendency of these proceedings at whatever stage thereof shall not be construed as and shall not constitute a bar or impediment to the effectiveness or effect of any act or step taken by the holder or holders of any note or notes secured by a deed or deeds of trust or mortgage upon any of the prop-

erty claimed to be a part of the estate of said bankrupt, taken by or on behalf of the holder or holders of any such note or notes in connection with the foreclosure or sale under any such deed of trust or mortgage, and that all such steps and acts should be as fully effective as though the within proceedings had never been instituted.

WHEREFORE said William Diller prays that said orders, and each of them, be reversed and the within cause remanded to the United States District Court for the Southern District of California, Central Division, with instructions to reverse said orders, and each of them.

WILLCOX & JUDSON

By Oregon Smith

Attorneys for appellant,
William Diller.

(Endorsed) Assignment of Errors. Filed January 10, 1936. Paul P O'Brien, Clerk.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min. past 10 o'clock, Mar 30 1936 A M By R B Clifton Deputy Clerk

At a stated Term, to wit, the October Term, A. D. 1935 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the thirteenth day of January in the year of our Lord One Thousand Nine Hundred and thirty-six.

Present:

The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding,

Honorable FRANCIS A. GARRECHT, Circuit Judge,

Honorable WILLIAM DENMAN, Circuit Judge.

IN THE MATTER OF THE PETITION OF WILLIAM DILLER, BANKRUPT FOR ALLOWANCE OF APPEAL. } No. 8092

ORDER ALLOWING APPEAL

Upon consideration of the petition of William Diller, for allowance of appeal herein under section 24b of the Bankruptcy Act, filed January 10, 1936, together with assignments of error thereon, and good cause therefor appearing,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Southern District of California, Central Division, made and entered on December 13, 1935, and the order of January 4, 1936, be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars ($250.00) with good and sufficient security, within ten days from date.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min. past 10 o'clock, Mar 30 1936 A M By R B Clifton Deputy Clerk

[Title of Court and Cause.]

No. 23967-C

STIPULATION RE PREPARATION OF TRANSCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between Robert Mack Light, attorney for Michael Shoemaker, one of the appellees herein, and Bauer, Macdonald, Schultheis & Pettit, attorneys for the John Hancock Mutual Life Insurance Company, a corporation, and the California Trust Company, a corporation, appellees herein, and Willcox & Judson, attorneys for William Diller the above named bankrupt and the appellant herein, that in the preparation of the transcript on appeal herein the clerk of the above court may be permitted, and he is hereby directed to omit captions from the papers contained in said transcript and to substitute in lieu thereof the following:

"Title of Court and Cause"

and

IT IS FURTHER STIPULATED by and between said parties, through their said attorneys of record, that in the petitions for allowance of appeal of said appellant to both the above entitled court and the United States Circuit Court of Appeals for the Ninth Circuit the orders of the above court herein appealed from, made the 13th day of December, 1935, and the 4th day of January, 1936, may

be omitted, and that there may be substituted in lieu thereof the following:

"Omitted but set forth elsewhere in full, at pages ..... and .....".

Dated this 2nd day of March, 1936.

Robert Mack Light
Attorney for Michael Shoemaker

BAUER, MACDONALD, SCHULTHEIS & PETTIT
By John L. Rowland
Attorneys for John Hancock Mutual Life Insurance Company and California Trust Company

WILLCOX & JUDSON
By Oregon Smith
Attorneys for William Diller

[Endorsed]: Filed R. S. Zimmerman, Clerk at 58 min. past 10 o'clock Mar 30 1936 A M By R B Clifton Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 23967-C

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL

To the Clerk of the United States District Court, Southern District of California, Central Division:

Please disregard all former praecipes herein and prepare and certify a transcript on appeal in the above entitled matter, and include therein the following papers and documents:

1. Circuit Court of Appeals citation.
2. District Court citation.
3. Circuit Court of Appeals petition for allowance of appeal.
4. District Court petition for allowance of appeal.
5. Circuit Court of Appeals Assignment of Errors.
6. District Court assignment of Errors.
7. District Court order allowing appeal.
8. Bond for Costs on Appeal.
9. Agreed statement of case.
10. Clerk's certificate to transcript.
11. That certain District Court order made and dated the 13th day of December, 1935, entitled "Decision".
12. That certain District Court judgment made and dated the 4th day of January, 1936, entitled "Judgment of Dismissal".
13. Circuit Court of Appeals Order allowing appeal.

14. This praecipe.

Dated this 30 day of March, 1936.

WILLCOX & JUDSON

By Oregon Smith

Attorneys for Bankrupt.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

IN THE MATTER OF THE ESTATE OF WILLIAM DILLER, Bankrupt.

No. 23967-C

AFFIDAVIT OF SERVICE BY MAIL.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

Dorothy Macey, being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business/residence address is: 400 Title Insurance Bldg. 433 S. Spring Street, Los Angeles, California that on the 30th day of March, 1936, affiant served the within Praecipe indicating portions of record to be incorporated in transcript on appeal on the Michael Shoemaker in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Michael Shoemaker at the office/residence

address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "Mr Robert Mack Light, Attorney-at-Law, 440 Court Street, San Bernardino, California."; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Dorothy Macey

Subscribed and sworn to before me this 30th day of March, 1936.

[Seal] George A. Judson
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Praecipe this 30th day, of March, 1936 Bauer, Macdonald, Schultheis & Pettit By John L. Rowland Attorneys for John Hancock Mutual Life Insurance Company and California Trust Company. Filed R. S. Zimmerman, Clerk at 33 min. past 4 o'clock Mar 30, 1936 P. M. By R. B. Clifton Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 58 pages, numbered from 1 to 58 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation in the District Court of the United States; citation in United States Circuit Court; agreed statement of the case; decision dated December 13, 1935; judgment of dismissal; petition for appeal; assignment of errors; order allowing appeal; bond for costs in the District Court of the United States; petition for appeal; assignment of errors; order allowing appeal in the United States Circuit Court; stipulation re preparation of transcript, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8092.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
WILLIAM DILLER,
Bankrupt.

William Diller,
Appellant.

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

HARRY GRAHAM BALTER,
Van Nuys Bldg., 210 W. 7th St., Los Angeles,
Attorney for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Text Books and Encyclopedias.

No. 8092.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
WILLIAM DILLER,
Bankrupt.

William Diller,
Appellant.

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

I.
FACTS.

The facts involved in this appeal are embodied in an "AGREED STATEMENT OF CASE." [Tr. pp. 6-22.]

Condensed for the sake of brevity and chronologically outlined as near as possible, the facts follow:

1. September 14, 1934, appellant, alleging he was a farmer, filed his petition under section 75, subsections (a) to (r), of the Bankruptcy Act as amended.

2. Thereafter, as required by section 75 (a) to (r) of the Bankruptcy Act, appellant submitted an offer for composition which was rejected by his creditors.

3. On March 4, 1935, the Conciliation Commissioner under section 75 (a) to (r) proceedings filed his certificate that the composition had failed and recommended that appellant be adjudged a bankrupt under section 75, subsection (s), of the Bankruptcy Act as then existing.

4. On the same day, March 4, 1935, appellant filed his amended petition to be adjudged a bankrupt under section 75 (s) of the Bankruptcy Act; the order of adjudication followed.

5. Proceedings under section 75 (s) of the Bankruptcy Act were immediately referred to D. W. Richards, Referee in Bankruptcy for San Bernardino county.

6. From March 5, 1935, through May 27, 1935, when the Supreme Court declared section 75 (s) of the Bankruptcy Act as then existing unconstitutional, proceedings were had before Referee Richards under the old section 75 (s) of the Bankruptcy Act.

7. Immediately following the Supreme Court's action, that is on June 3, 1935, the appellee Shoemaker, holder of a delinquent trust deed on a farm in San Bernardino county, which farm was included as one of appellant's assets in his schedules, moved to dismiss the bankruptcy proceedings before the Referee because of the invalidity of section 75 (s) of the Bankruptcy Act; the motion was granted.

8. Then on June 24, 1935, appellant Diller filed an amended petition praying:

(a) To dismiss the proceedings in so far as they were affected by section 75 (s) of the Bankruptcy Act, which had just been declared unconstitutional; and

(b) For an extension of time to attempt a second offer for composition with creditors under the subsections (a) to (r) of section 75 (s).

A ninety-day extension to September 22, 1935, was granted.

9. Meanwhile, on August 28, 1935, Congress passed new amendments to section 75 (s) of the Bankruptcy Act; it is the interpretation of this amended section 75 (s) of the Bankruptcy Act which is now the subject of this appeal.

10. So on September 19, 1935, having again failed to effect a composition under section 75 (s) of the Bankruptcy Act, appellant filed an amended petition to be adjudged a bankrupt under section 75 (s) of the Bankruptcy Act as newly amended by Congress on August 28, 1935. Adjudication under the new act was ordered.

11. At the time of his original petition filed September 14, 1934, appellant owned, among other properties, two pieces of realty:

(a) One parcel was a ranch consisting of approximately 265 acres located in San Bernardino county, California, which property was subject to a trust deed held by appellee Shoemaker securing a promissory note upon which principal was unpaid and delinquent in the sum of $48,000; interest was also due to the extent of $6,000; 9/10ths of the taxes for 1931-32 was unpaid; the trust deed was in existence prior to said September 14, 1934.

The trust deed was in the usual form and gave the creditor the usual rights under a California trust deed, as appears more in detail in the Transcript of Record, pages 11 and 12.

(b) The other property was a house and lot located in the city of Los Angeles, California. The property was subject to a trust deed held by appellee John Hancock Mutual Life Insurance Company in the principal sum of $20,000, and securing a promissory note. As of November 25, 1935, there was delinquent, besides the principal, interest and taxes in the sum of $7,434.06, besides taxes for the year 1934-1935. This trust deed is likewise in the customary California form and the terms are more particularly set out in the transcript of record, pages 14 and 15.

12. Appellant's proposal for composition with creditors, made on September 18, 1935, under the procedure outlined by section 75 (a) to (r) of the Bankruptcy Act, and made before appellant filed his petition under section 75 (s) as amended of the Bankruptcy Act, offered to pay the sum of $46,550.00 in satisfaction of the promissory note and trust deed held by appellee Shoemaker, and offered to pay the sum of $21,610.00 in satisfaction of the promissory note and trust deed held by appellee John Hancock Mutual Life Insurance Company, each of said sums having been the value placed upon the respective properties by appraisers appointed in the earlier proceedings.

13. On July 24, 1935, appellee Shoemaker, and on July 25, 1935, appellee John Hancock Mutual Life Insurance Company, each respectively filed petitions for leave to foreclose under their respective trust deeds. [Tr. pp. 17-18.]

14. Hearing on these two motions was held September 5, 1935. The motions were denied without prejudice to renew them after an expiration of thirty days.

15. But on September 21, 1935, appellant Diller was adjudicated a bankrupt under section 75 (s) as amended of the Bankruptcy Act.

16. On November 19, 1935, both appellee Shoemaker and appellee Hancock Company renewed their motions for leave to foreclose under their trust deeds, and further to dismiss the proceedings under section 75 (s) as amended of the Bankruptcy Act, but now on the additional ground that this new amended section was also unconstitutional.

17. On November 25, 1935, a hearing on these motions was had before the District Court. Evidence was had and received as is more fully set out in the Transcript, page 20.

18. On December 13, 1935, the District Court, relying solely upon the issue of constitutionality, ruled that section 75 (s) as amended of the Bankruptcy Act was unconstitutional. [Tr. p. 23 *et seq.*]

19. On January 4, 1936, based upon this opinion, a formal judgment of dismissal was filed dismissing the proceedings under section 75 (s) as amended, as well as under section 75 (a) to (r) of the Bankruptcy Act, and expressly permitting appellees to pursue their remedies under their respective deeds of trust. [Tr. pp. 33 to 34.]

20. Subsequent to the taking of this appeal, appellee John Hancock Mutual Life Insurance Company and appellee Shoemaker have each foreclosed under their respective trust deeds, and thereafter each has filed a suit for deficiency judgment in the state court, which suits are now pending.

II.

SPECIFICATION OF ERRORS RELIED UPON.

Appellant relies upon the following specifications of errors:

1. The court erred in holding that the existing subsection (s) of section 75 of the Bankruptcy Act deprives secured creditors of the above named bankrupt, and more particularly Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation, of substantive rights without compensation, in violation of the Constitution of the United States of America, and is therefore invalid.

2. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Company and California Trust Company, of the right to determine when a sale of such property shall be held after default made by the bankrupt in the payment of obligations secured by said deeds of trust, subject to the discretion of the court; and the court erred in holding that such right is postponed for three years or for a shorter time at the pleasure of the debtor and not the holder of such deeds of trust.

3. The court erred in holding that said subsection (s) deprives holders of deeds of trust upon real property of said bankrupt, and more particularly the said Michael Shoemaker, John Hancock Mutual Life Insurance Com-

pany and California Trust Company, of the right, pending such sale and during the period of such default, subject only to the discretion of the court, to have the rents and profits from such real property collected by a receiver for the satisfaction of said obligations, and to control said property.

4. The court erred in holding that the period of redemption allowed by said subsection (s), after the sale of real property of the bankrupt at public auction at the request of a creditor holding a deed of trust thereon, deprives the holder of such deed of trust of a property right.

5. The court erred in ordering the dismissal of the within bankruptcy proceeding.

III.
THE ISSUES.

From this statement of the facts, it is clear that the record presents only two issues:

(A) At the time when the District Court dismissed the bankruptcy proceedings solely upon the ruling that Section 75 (s) as amended of the Bankruptcy Act was unconstitutional, had the proceedings reached that legally requisite stage where the constitutionality of the legislation was open to attack?

(B) Was the District Court right in holding that Section 75 (s) as amended of the Bankruptcy Act is unconstitutional?

IV.
ARGUMENT.

(A) The Issue of Constitutionality of Section 75 (s) as Amended of the Bankruptcy Act was Prematurely Raised, There Being No Showing Before the District Court at That Time That the Property Rights of Appellees Had Been Injured by the Operation of the Act.

The act, among other things, provides that when the farmer-debtor's attempts at a composition with his creditors have failed under section 75 (a) to (r), then an amended petition may be filed by the debtor for adjudication of the bankrupt under section 75 (s) as amended of the Bankruptcy Act. The act then states [Title 11, U. S. Code Annotated, Sec. 203, Subsec. (s)]:

> "* * * Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his unencumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and

appeals, in accordance with this title: *Provided,* that in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear."

Only after these preliminary steps have been taken and complied with may the court "stay all judicial proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years." (Title 11, U. S. Code Annotated, section 203, subsection 3, paragraph 2; section 75 (s) as amended of the Bankruptcy Act.)

Obviously, the mere institution of proceedings under the act did not prejudice the creditors. As far as the record shows nothing would ever have been done under the new proceedings taken under the amended Frazier-

Lemke Act. The record speaks of appraisal values having been placed upon the properties of appellees, but these appraisal proceedings had apparently been taken under procedure outlined in section 75 (a) to (r). [Tr. pp. 16, 17.]

The record does not indicate that the prerequisite steps outlined in section 75 (s) of the Bankruptcy Act had been taken which would have entitled the court to stay all foreclosure proceedings for three years. Nor does it follow that the three-year stay would automatically have been granted. If the debtor had been unable to show his ability to pay a reasonable rental to be fixed by the court, the stay would not have been granted. The immediate point is *that the court had at no time made any such order.* At the time, therefore, when the court dismissed the proceedings of appellant no injury to the property rights of appellees had been done; there was no order preventing them from proceeding with their rights as secured creditors under the trust deeds. Whether the court would have subsequently stayed proceedings does not appear, and conjecture on this point can be no basis for voiding statutory proceedings on alleged grounds of unconstitutionality.

Under this state of facts the well-established doctrine of law is controlling, namely: *A law shall not be declared unconstitutional unless it affirmatively appears that at the time the question is raised the carrying out of the allegedly invalid act would immediately prejudice the suitor's right to person or property.*

See:

Dallas Joint Stock Land Bank v. Davis, 83 Fed. (2d) 322, at 323 (C. C. A. 5, May 5, 1936).

In this case the farmer had started to proceed under the amended Frazier-Lemke Act.

"The District Judge thought the act as amended did not take, but safeguarded, appellant's substantial rights as a secured creditor. He found, on sufficient evidence, that at that stage of the proceedings there was no such showing of inability to finance the debt with the assets involved as would justify the court in refusing to take jurisdiction. He ordered the case referred to a special conciliation commissioner for statutory proceedings. It was at this juncture and from this order that this appeal was taken.

"The record before us stops at this point. We do not know, there is no showing, whether appellees could or did comply with the provisions of the act to obtain, there is no order granting, the statutory stay. The only order here for review is the one refusing to dismiss the application, and referring it for statutory proceedings. On the record we have, the only effect of this order on appellant at this time is to prevent the collection of its debt through the state court proceedings, by requiring its collection through the bankruptcy court. Though the attack is predicated upon the claim that the necessary effect of the order under the act will be to deprive appellant of substantial property rights, no evidence is offered to show this. The appeal is here on the broad claim that on its face, and as a necessary result of its

operation, the invoked section takes away substantial rights of appellant in its security, and within the Radford Case is unconstitutional and void.

"This claim raises a preliminary question of prime importance whether, at this stage of the proceedings, when nothing has been done but to take jurisdiction, appellant's constitutional attack is premature. It is urged that an inquiry will not be conducted into a complainant's constitutional rights until there has been a substantial invasion of them, and that nothing of that kind has occurred here. It is insisted that while the act as amended does direct the granting of a stay of collection for a maximum period of three years, this stay is not granted as of right absolutely and at all events, but only upon conditions, the prime one of which is the exercise of judicial discretion whether the stay may be granted with a due regard for the substantial rights of creditors in their securities.

"It may not be doubted that if the necessary result of the act is to take away appellant's substantial rights in its security, it need not wait until all the forms prescribed for that taking away have been gone through with, but may sue at once to save itself. * * * It is equally without doubt, however, that the action is premature, and that no constitutional question is presented for decision if the pinch of the act will be felt by appellant not as a necessary, but only as a possible, result of its application. For it is a settled rule in the federal courts that questions of constitutional law will not be anticipated, but will be decided only where a present necessity for such decision exists, and then only no more broadly than the precise situation in question requires. * * *"

See also:

United States National Bank of Omaha v. Pamp, 77 Fed. (2d) 9 (C. C. A. 8, April 23, 1935).

Here the original Frazier-Lemke Act was attacked as unconstitutional and the court refused to pass upon that issue because the proceedings under the act had not reached that stage where the unconstitutionality should with propriety be passed upon.

> "It is argued that this provision is unconstitutional because the lienholder is deprived of his property without due process of law, contrary to the provisions of the Fifth Amendment. Undoubtedly, as said by the Supreme Court in Continental Illinois National Bank & Trust Company v. C. R. I. & P. Ry. Co., *supra,* the power of Congress has limitations, but 'those limitations have never been explicitly defined,' and we do not think it necessary to the determination of this case to pass upon the validity of subdivision (s). As yet nothing has been done to appellants' security; except to stay proceedings. It is quite possible that an offer of composition may be made which will be as acceptable to appellants as continued ownership of the mortgage or ownership of the real estate. In other words, the provisions of this subdivision may never be invoked. The unconstitutionality of this subdivision would not necessarily invalidate the other provisions of the act, and ordinarily a litigant can be heard to question a statute's constitutionality only when and so far as it is being or is about to be applied to his disadvantage. * * *"

See also to the same effect:

In re Paul, 13 Fed. Supp. 645, at 647 (District Court of Iowa, February 8, 1936).

It is earnestly submitted that upon this recognized ground alone the decree of the District Court should be reversed and the cause remanded for further proceedings.

If we are correct in this, a consideration of the constitutionality of section 75 (s) as amended of the Bankruptcy Act is entirely unnecessary. However, for the sake of completeness we have included a discussion respecting the constitutionality of this statute.

(B) The New Frazier-Lemke Act Is Constitutional.

Since Charles Evans Hughes, before becoming Chief Justice, pithily remarked that "the Constitution is what the Supreme Court says it is," we might be forgiven if we simply urged this Honorable Court to sustain the constitutionality of the amended Frazier-Lemke Act solely upon the basis of the presumption of constitutionality of any act not absolutely unconstitutional on its face, leaving to the Supreme Court to take upon itself the onus of deciding the ultimate constitutionality of the Act.

We feel, however, that the moral weight of a ruling by this distinguished court holding the act valid is well worth the burden of going forward with proof of constitutionality. We likewise feel that in the interim before final ruling by the Supreme Court, a decision of this Honorable Court upholding the act would do much to stabilize conflicting views now prevalent throughout the circuit, both on the bench and at the bar.

(1) Analysis of the Original Subsection (s) of Section 75 of the Bankruptcy Act Declared Unconstitutional by the Supreme Court.

The scheme of the original subsection (s) was that upon a failure to effect a composition or extension the debtor could file an amended petition asking to be adjudged a bankrupt. His property was then appraised "at its then fair and reasonable value, not necessarily the market value, at the time of such appraisal." It was then provided that after exemptions had been set aside to the debtor he should remain in possession, under the control of the court, of any part or parcel or all of the remainder of his property, subject to a general lien as security for the payment of the value thereof to the creditors, which general lien was to be inferior to all existing liens, the latter remaining in full force and effect. Upon request of the debtor and with the consent of the lienholders, it was provided that the trustee "shall agree to sell to the debtor any part, parcel, or all of the remainder of the bankrupt estate at the appraised value upon installments spread over a long period of years." Upon payment of the appraised price in installments, the debtor was to receive a clear and unencumbered title to such property as he elected to buy. If he failed to complete the purchase price or to comply with the orders of the court, the secured creditors were permitted to enforce their security in accordance with law. But they were compelled, upon payment of the appraised value of all or any part of the debtor's property, to discharge all liens of record on such property. If the debtor complied with all orders of the court and paid the appraised value, he was entitled to his discharge.

If, however, any secured creditor filed written objections to the scheme of payment, then the court was em-

powered to stay all proceedings for a period of five years, during which time the debtor remained in possession of all or any part of his property under control of the court, provided he paid a reasonable rental annually for that portion of the property of which he retained possession. At the end of the five-year period, or prior thereto, the debtor might pay into court the appraised price of the property of which he retained possession, subject to a re-appraisal, in which event he might pay the reappraised price if acceptable to the lienholders. But, if the re-appraised price was not acceptable to the lienholders, he paid the original appraisal price and thereupon the court turned over full possession and title of such property as the debtor paid for to the debtor and he might apply for his discharge. If, during the five year period the debtor failed to comply with the orders of the court, the payment of rental, etc., his estate was to be liquidated through the ordinary channels of bankruptcy. It was expressly provided that all the terms and provisions of subsection (s) should apply only to debts existing at the time the subsection became effective.

(2) Analysis of the Case of Louisville Joint Stock Land Bank v. Radford.

This is the case in which the Supreme Court of the United States declared subsection (s) of section 75 of the National Bankruptcy Act unconstitutional in an opinion delivered by Mr. Justice Brandeis. (79 L. Ed. 920.) In this case Radford made a mortgage of 170 acres of land, presumably of the appraised value of at least $18,000.00, to the Louisville Joint Stock Land Bank to secure loans aggregating $9,000.00, to be paid in installments over the period of 34 years, with interest at the

rate of six per cent. Radford's wife joined in the mortgages and the notes. The Radfords made default in their covenant to pay taxes, in their promise to pay installments of interest and principal, and in their covenant to keep the building insured. The bank declared the entire indebtedness immediately due and payable and commenced suit in the state court to foreclose the mortgages and for the appointment of a receiver to take possession and control of the premises and to collect the rents and profits. The application for the appointment of a receiver was denied and all proceedings were stayed upon request of the Conciliation Commissioner appointed under section 75 of the Bankruptcy Act, as he stated that Radford desired to avail himself of the provisions of that section.

Under subsection (a) to (r) of section 75, Radford filed in the federal court a petition for composition, which was approved, and the first meeting of creditors was held. Composition failed and finally the state court entered a judgment ordering a foreclosure sale.

Meanwhile, the Frazier-Lemke Act had been passed on June 28, 1934, and Radford filed an amended petition for relief thereunder. Answering the petition the bank claimed the Frazier-Lemke Act was unconstitutional and that Radford's amended petition should be dismissed and the bank permitted to pursue its remedies in the state court. The bank's objections were overruled and the referee ordered an appraisal. The appraisers found that the fair and reasonable value of the mortgaged property, and also the market value of the same, was $4,445.00. The bank refused to consent to a sale of the mortgaged property to Radford at the appraised value and filed written objections thereto and thereupon the referee or-

dered that for the period of five years all proceedings for the enforcement of the mortgage should be stayed and that the possession of the mortgaged property, subject to liens, should remain in Radford under the control of the court at a fixed rental, and the case arose upon review of his orders.

It was contended by the bank, first, that if the Act was applied solely to mortgages created after it became effective, it was not a proper exercise of the bankruptcy power, and second, that if the act was applied to pre-existing mortgages, it violated the Fifth Amendment to the Constitution of the United States in that it deprived the bank of its property without due process of law and without just compensation.

In the first part of his opinion (we feel it not necessary to discuss this in detail here), Justice Brandeis clearly recognized that it was possible without violating any constitutional amendment to grant by legislation a valid stay to the mortgagor. The court intimated very strongly that if the Frazier-Lemke Act had been drawn along the lines of the Minnesota Moratorium Act, which was held constitution in *Home Building & Loan Assn. v. Blaisdell,* (290 U. S. 398, 78 L. Ed. 413), the act might have been constitutional. In the Minnesota Act, the statute left the period of extension of the right of redemption to be determined by the court within the maximum limit of two years and even after the period had been decided upon, it could be reduced by order of the court under the statute in case of a change in circumstances.

(3) Analysis of the New Subsection (s) Shows That It Substantially Meets the Requirements of the Radford Case.

We turn now to a consideration of the new Frazier-Lemke Act. The scheme of the new subsection (s) resembles in some respects the old subsection (s) but very material changes have been made in the new act.

There is the same provision for amendment of the original petition filed under subsections (a) to (r) of section 75 and adjudication as a bankrupt and appraisal of the property. The principal change, as far as appraisal is concerned, is that under the new Act property is to be appraised at its fair and reasonable market value instead of its fair and reasonable value, not necessarily market value, as provided in the old act.

Perhaps the most significant change is the complete elimination of the plan of purchase by the bankrupt on installments over a long period of years at a totally inadequate rate of interest. This is the plan which was so severely condemned by Mr. Justice Brandeis in the *Radford* case. Under the old act, although the plan was conditional upon the assent of the mortgagee, nevertheless if he failed to assent to the plan, the farm debtor could retain possession of the property under control of the court for the period of five years. The point the court had in mind was undoubtedly that a consent obtained under such circumstances was in reality no consent at all. This feature, however, of the old act has been entirely eliminated from the new.

The new act provides merely for what is in effect a moratorium. The rights and remedies of the mortgagee remain unimpaired but their operation is suspended during

the period of the moratorium. The provision of the new Act is that after the value of the debtor's property has been fixed by appraisal, the referee shall issue an order setting aside exemptions and shall further order that the possession under the supervision and control of the court of any part or all of the remainder of the debtor's property shall remain in the debtor subject to all existing liens, which are to remain in full force and effect. It then provides that when the conditions set forth in the Act have been complied with, the court shall stay all proceedings for a period of three years. The debtor remains in possession during the period, subject to the control and supervision of the court provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The amount and kind of such rental is to be the usual customary rental in the community where the property is located, based upon the rental value, net income and earning capacity of the property. It is to be paid into court and used first for the payment of taxes and upkeep of the property and the remainder is to be distributed among secured and unsecured creditors and applied on their claims as their interests may appear. The court also may, in addition to the rental, require payments on account of principal to be made quarterly, semi-annually or annually, consistently with the protection of the rights of the creditors and the debtor's ability to pay with a view to his financial rehabilitation.

At any time during the three year period the debtor may pay into court the amount of the appraised value of the property which he retains, less the amount he may previously have paid on principal, provided, however, that any creditor may demand a reappraisal, in which event

the debtor pays the reappraised price and provided, further, that upon request in writing by any secured creditor the court shall order the property upon which such secured creditors have a lien to be sold at public auction.

It can therefore be seen at a glance that all that the new Act has accomplished is to grant to the debtor a moratorium or breathing space for a maximum period of three years. But it is quite significant that the last section of the Act provides for a shortening of the time in the event that the court finds the emergency which necessitated the Act no longer exists and may then proceed to liquidate the estate. This provision brings the Act into harmony with the Minnesota moratorium statute, which was held constitutional in the *Blaisdell* case, *supra*.

Mr. Justice Brandeis enumerated in the *Radford* case the rights which the mortgagee had until he was deprived of them by the enactment of the old subsection (s). It is therefore pertinent to examine these rights and see to what, if any, extent they have been impaired by the new subsection (s):

(a) The first of these rights is "the right to retain the lien until the indebtedness thereby secured is paid." This right has not been impaired in any degree whatever. The Act specifically provides that the debtor's possession is subject to all existing mortgages, liens, pledges or encumbrances, and that all such existing mortgages, liens, pledges or encumbrances shall remain in full force and

effect and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the payment of the claims of the secured creditors as their interests may appear. [Section 1 of subsection (s).]

(b) The second right is "the right to realize upon the security by a judicial public sale." In contradistinction to the old act, the new one specifically preserves this right for although the right rests in abeyance during the period of the moratorium, yet it is always there. If the debtor, during the period of the moratorium, pays into court the appraised price, the secured creditor is not bound to accept it but can, upon written request, demand a sale at public auction. If the debtor fails at any time to comply with the provisions of the Act or with the orders of the court or is unable to refinance himself within three years, the court may order the appointment of a trustee and order the property sold through the usual bankruptcy channels. [Section 3 of subsection (s).]

It is obvious that under such circumstances the secured creditor has the right to realize on his security by an immediate public judicial sale. The same thing is true if the moratorium is shortened by a finding that the emergency which justified it has ceased to exist. [Section 6 of subsection (s).]

(c) The third right is "the right to determine when such sale shall be held, subject only to the discretion of the court." This right must necessarily be impaired because the impairment of the right is of the essence of all

moratorium legislation. Whether such impairment is unconstitutional is the real question in the case and will be discussed at a later point in this brief.

(d) The fourth right is "the right of the secured creditor to protect its interest in the property by bidding at such sale whenever held and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt either through receipt of the proceeds of a fair competitive sale or by taking the property itself." It cannot for a moment be contended that this right has been impaired. The new Act specifically gives to the creditor the right to demand a public sale at auction. The Act does not forbid the creditor to bid at his own sale and there is nothing in the Act to suggest that such a right has been or is intended to be abridged. The preservation of this right is one of the fundamental differences between the old and the new legislation. This right was destroyed completely by the old legislation and its destruction was one of the features most severely condemned by Mr. Justice Brandeis.

(e) The last right is "to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt." It must be admitted that this right has to some extent been impaired, but here again, as in the case of the right to determine when the sale shall be had, impairment is implicit in all moratoriums.

(4) A Moratorium for a Maximum Period of Three Years Does Not Violate the Fifth Amendment or Deprive the Secured Creditor of His Property Without Due Process of Law.

Mr. Justice Brandeis, in the Radford case, *supra,* suggested very pointedly that if the original subsection (s) provided merely for a moratorium, as did the Minnesota Act in the Blaisdell case, *supra,* it would have been constitutional. He condemned the original legislation because it provided a method of giving to the debtor his property free and clear of the mortgage without satisfying the obligation. The present legislation attempts no such thing and merely suspends the secured creditor's rights and remedies during the period of the moratorium.

The Minnesota moratorium was, as has been said, held constitutional in the *Blaisdell* case, the doctrine of which was reaffirmed by Mr. Justice Brandeis in the *Radford* case. It is true that in the *Blaisdell* case there was no question of conflict with the Fifth Amendment because that amendment restricts only the legislative power of Congress and not of the several states The Fourteenth Amendment, however, restricts the legislative power of the states in substantially the same fashion as the Fifth restricts that of Congress. If, therefore, the Fourteenth Amendment was not violated by the Minnesota moratorium, it must follow that the Fifth Amendment is not violated by the new subsection (s). It is true that the source of power in the two cases is entirely different. When the legislature of Minnesota passed the moratorium act it was exercising the police power reserved to it by the Federal Constitution. When Congress passed the new subsection (s) it was exercising the bankruptcy

power expressly granted to it by the Federal Constitution. However, as we have said before, it was conceded, if not decided in the *Radford* case, that even the legislation under attack in that case was within the bankruptcy power. Assuming, therefore, that the power exists in both state and national legislatures to adopt moratorium legislation, the only remaining question is whether there has been any violation of the Fourteenth or Fifth Amendments by the respective legislatures. Consequently, the moratorium legislation of Minnesota declared to be constitutional in the *Blaisdell* case is a convenient yardstick for measuring the constitutionality of the new subsection.

The Minnesota statute was explained by Mr. Chief Justice Hughes in his opinion in the *Blaisdell* case as follows:

> "We approach the questions thus presented upon the assumption made below, as required by the law of the state, that the mortgage contained a valid power of sale to be exercised in case of default; that this power was validly exercised; that under the law then applicable, the period of redemption from the sale was one year and that it has been extended by the judgment of the court over the opposition of the mortgagee purchaser; and that during the period thus extended, and unless the order for extension is modified, the mortgagee purchaser will be unable to obtain possession, or to obtain or convey title in fee, as he would have been able to do had the statute not been enacted. *The statute does not impair the integrity of the mortgage indebtedness. The obligation for interest remains. The statute does not affect the validity of the sale or the right of a mortgagee purchaser to title in fee, or his right to obtain a deficiency judgment, if the mortgagor fails to redeem*

within the prescribed period. Aside from the extension of time, the other conditions of redemption are unaltered. While the mortgagor remains in possession he must pay the rental value as that value has been determined, upon notice and hearing, by the court. The rental value so paid is devoted to the carrying of the property by the application of the required payments to taxes, insurance and interest on the mortgage indebtedness. While the mortgagee purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period." (290 U. S. pp. 442-425; 78 L. Ed. 421-422; Italics ours.)

The principal distinction between the Minnesota statute, as described by Mr. Chief Justice Hughes, and the new subsection (s) is that the Minnesota statute permitted a sale, but, by extending the period of redemption, left the mortgagor in possession, whereas subsection (s) restrains all proceedings including the sale and leaves the mortgagor in possession during the period of the moratorium. Another distinction is that the Minnesota statute provided for an extension of the period of redemption for two years, whereas subsection (s) provides for a moratorium of a maximum of three years. These are not vital distinctions. In the one case the mortgagee is permitted to have a sale which gives him neither title nor possession during the extended period of redemption; in the other he is not permitted to have a sale and is deprived of title and possession during a maximum period of three years. What difference is there between permitting a sale which realizes nothing from the security for a period of two years and preventing realization upon the security for a period of three years? The parallelism between the Min-

nesota moratorium and subsection (s) is perfect. The only real distinction is the difference betwen two and three years. Will the highest court of our land, after having sustained the constitutional validity of the one act which in effect provides for a two year moratorium, strike down subsection (s) merely because it provides for an additional year? Does constitutionality lie in the difference between two years and three years?

(5) The Better Reasoned Cases Uphold the Constitutionality of the New Frazier-Lemke Act.

The decisions which have had occasion to pass upon the constitutionality of the Frazier-Lemke Act are fairly evenly divided.

Appellees will, of course, refer to those cases holding the new subsection (s) of section 75 of the Bankruptcy Act invalid.

In passing, however, two observations in connection with these cases to be cited by appellees should be made:

(1) In practically each of these cases, actual steps had already been taken by the creditors to enforce their property rights under their securities.

(2) All of these anti-Frazier-Lemke Act cases admit that the new amendment effectively preserves three of the five property rights of the creditor discussed in the *Radford* case, namely:

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by judicial sale.

4. The right to protect its interest in the security by bidding at such sale whenever held.

These cases insist that the amendment is invalid because two of the property rights spoken of in the *Radford* case are still inadequately protected, namely:

(3) The right to determine when such sale shall be held subject only to the discretion of the court; and

(5) The right to control meanwhile the property during the period of default and to have the rents and profits collected by a receiver for the satisfaction of the debt.

The following cases which hold the new Frazier-Lemke Act to be constitutional should be carefully examined:

Dallas Joint Stock Land Bank v. Davis, 83 Fed. (2nd) 322 (C. C. A. 5);

In re Slaughter, 12 Fed. Supp. 296, District Court, Northern District, Texas;

In re Reichert, 13 Fed. Supp. 1, District Court, Western District, Kentucky;

In re Cole, 13 Fed. Supp. 283, District Court, Southern District, Ohio;

In re Bennett, 13 Fed Supp. 353, District Court, Western District, Missouri.

In the *Dallas Joint Stock Land Bank* case, *supra,* the Circuit Court of Appeals for the Fifth Circuit said, among other things:

> "In approving the amendment, the judiciary committees of both House and Senate agreed that its object and purpose was the clarification of section 75 and the addition of a new subsection (s) in place of the subsection (s) held unconstitutional. Both com-

mittees in recommending the bill for passage declared that the new subsection had been written so as to conform to the decision of the Supreme Court and that they felt that it did conform. We think it not a strained construction to hold that it does.

"On its face the act merely transfers the liquidation of the indebtedness from state courts to the court of bankruptcy. It remits to the judicial discretion of that court the administration of the property of a bankrupt, with the end in view to bring about, if a due regard for the property rights and interests of his creditors permits it, a gradual and therefore more just and equitable liquidation, in lieu of an unduly hasty and forced one. Subsection (s) of the act as amended does indeed authorize a stay of collection for a maximum period of three years, during which time the debtor may remain in possession, but the stay so granted is not an absolute one. It is one granted and continued in the judicial discretion of the court if, and only if, this may be done without deprivation of or injury to, and upon conditions looking to the preservation of, the creditor's security. Under its provisions the court must fix, and require the debtor to pay, a reasonable rental on the property, to be applied upon the debt. Under its provisions, the court may, and if in the exercise of a sound discretion and protection and preservation of the security demand it, must require additional payments on the principal sum due and owing. Under its provisions. the court may, upon a finding that the preservation of the security requires it, revoke the stay order and direct the sale of the property.

"These provisions of the act make it clear, we think, that the act grants no absolute stay, permits no arbitrary or unjust interference with creditors.

It merely remits all questions regarding the collection of the debt to an informed judicial discretion, a discretion which, keeping the preservation of the security paramount, may yet, if circumstances permit, afford a means of relief to the debtor. They make it clear that the controlling, the dominant purpose and effect of the act as amended is not to deprive creditors of their security to give it to debtors, but to remit to judicial discretion in each case, whether the facts justify giving the debtor an equitable opportunity in an orderly way, to liquidate his indebtedness, provided always that the essential security of the creditor is not impaired, but preserved. A law on the subject of bankruptcy having this purpose and effect is not, in our judgment, violative of the Fifth Amendment. The authority of Congress to make uniform laws on the subject of bankruptcy is a broad one. It extends to and authorizes not merely ordinary bankruptcy laws, as they were understood and in existence at the time of the adoption of the Constitution, but insolvency laws in general. It extends to and authorizes all just laws, having for their object the liquidation of indebtedness. It lawfully embraces in its scope and purpose not only the just protection of the creditor, but the relief of the debtor. * * * Under its bankruptcy powers Congress lawfully provides for the complete abrogation of the personal obligation of debts, the discharge of the debtor. Under these powers Congress lawfully provides for the making of compositions; under them it lawfully marshals the properties of debtors and provides for their equitable distribution among the secured creditors, to the extent even of authorizing a complete rearrangement and rewriting of the obligations. Authorities, *supra*. Under these powers it

may, we think, make just provision for the exercise of judicial discretion in granting reasonable stays of liquidations in bankruptcy.

"We think the act on its face is within the bankruptcy powers of Congress; that nothing in the record we have shows that the necessary result of its application to appellant will deprive it of its property; that appellant is at this stage of the proceeding in no position to raise a constitutional question; and that the order appealed from should be affirmed. The affirmance, however, is without prejudice to the right of appellant to apply at any further stage of the proceeding, for relief from actions or orders which it is advised have the effect of depriving it of any substantial rights."

In the *Reichert* case, *supra,* the court carefully compares the new Frazier-Lemke Act with the invalidated old act and finds no difficulty in holding the amended act constitutional.

"The Supreme Court in the Radford Case decided that article 1, §8 of the Constitution, authorizing the Congress to establish uniform laws on the subject of bankruptcies, was restricted by the Fifth Amendment, and that the following property rights were conferred under the laws of Kentucky:

'(1) The right to retain the lien until the indebtedness thereby secured is paid.

'(2) The right to realize upon the security by a judicial public sale.

'(3) The right to determine when such sale shall be held, subject only to the discretion of the court.

'(4) The right to protect its interest in the property by bidding at such sale, whenever held, and thus

to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

'(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.'

"The court held that the act invaded these rights and was, therefore, void.

"Under the amendment, the farmer must have proceeded unsuccessfully under section 75 (a to r) of the old act (47 Stat. 1470) before invoking the provisions of subsection (s) of the amended act 11 U. S. C. A. §203 (s); that is to say, he must have failed to procure the assent of a majority in number and amount of the claims against him to composition or an extension proposal, or 'feel aggrieved' by such a proposal which has been accepted. When these facts are shown, the farmer may then file his petition under the amended act, subsection (s), asking that he be adjudged a bankrupt and allowed the benefits of this subsection.

"All of the property of the debtor is then appraised at its reasonable, fair market value, with the right in either debtor or creditor to file exceptions to the value thus determined within four months from the date of the approval of the appraisal by the referee. After the value of the debtor's property has been determined by appraisal, the referee is to set aside to the farmer his 'unencumbered exemptions,' and all of the remainder of the property of the debtor is to remain in his possession under the supervision and control of the court, 'subject to all existing mortgages, liens, pledges or encumbrances.'

"After these things are done, if the court concludes the proceedings are in good faith and it is made to reasonably appear that a debt liquidation may be effected, the court may direct a stay of all proceedings against the debtor or his property for a period of three years, conditioned on the farmer paying semiannually a reasonable rental to be fixed by the court for such of his property as he retains in his possession. The rental to be paid as defined in the act is 'the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property,' [11 U. S. C. A. §203 (s) (2)] and when paid shall first be applied by the court upon taxes and upkeep of the property; the remainder, if any, to be paid to lien creditors and unsecured creditors as their interest may appear. The first rental payment is not due until one year from the date of the order of the court staying proceedings, and thereafter shall be paid every six months.

"In addition to rental payments, the court, in its discretion, may require quarterly, semiannual, or annual payments on the principal, 'not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.' 11 U. S. C. A. §203 (s) (2). The court may also, in its discretion, order sold at public or private sale any nonexempt personal property which is (a) perishable, or (b) not reasonably necessary for the farming operations of the debtor, if the court concludes such a sale necessary to protect the creditors from loss or to conserve the security.

"At the end of the 3 years' extension period, or at any time prior thereto, the farm debtor may purchase the property retained in his possession free and clear

of claims of his creditors by paying into court the amount of the appraised value of the property, credited by any amount which has theretofore been paid on the principal. This right to purchase is subject to the following limitations:

"(1) Any creditor, or the debtor himself, may demand a reappraisal of the property at the date of the proposed purchase, in which event new appraisers are to be appointed by the court, or the court may hear evidence and fix the value of the property. The debtor is then required, before obtaining the property, to pay the value thereof as determined either by the new appraisement or the value as fixed by the court.

"(2) Any secured creditor, upon written request to the court, may demand that the property upon which he has a lien be sold at public auction, and if sold the debtor is accorded the right to redeem the property at any time within 90 days after the sale by the payment of the sale price, together with 5 per cent. interest thereon. After full compliance with the provisions of the act and all orders issued by the court in the course of the proceedings, the farmer is granted a discharge.

"If he fails to comply with any order of the court pursuant to the provisions of the act or is unable to refinance himself within 3 years, the court may appoint a trustee and order the property sold or otherwise disposed of as provided under the original Bankruptcy Act.

* * * * * * * * *

"Under the amended act, the exclusive right of the debtor to purchase the mortgaged property at its appraised value is taken away. The mortgagee can

require a public sale to the highest and best bidder, and of course has the right to protect himself by bidding at the sale. His lien is preserved until the pledged property has been sold and the proceeds used to discharge the lien debt. The amended act, when fairly construed, conditionally extends the period of sale to enforce the lien 3 years, with 90 days added as a period of redemption to the debtor. Within the 3-year period, the debtor, if he retains the possession of the property, must pay the fair rental value thereof, and in addition thereto may be required to make payments on the principal; the latter, however, not to be inconsistent with the protection of the rights of the creditors and the debtor's ability to pay with a view to his financial rehabilitation.

* * * * * * * * *

"It follows that the court is not authorized to grant the 3-year extension unless it is made to reasonably appear that the lien creditor will not suffer any substantial loss in the value of his security by reason of the delay. The original purpose of Acts of Bankruptcy was to bring about a prompt, equal disposition of the debtor's property among his creditors, and to relieve the debtor of obligations and responsibilities following a business misfortune, and to permit him to start afresh. However with the change in the condition of the relationship of debtors and creditors, the scope of original acts has been extended to persons, properties, and different debtor contracts.

* * * * * * * * *

"Section 77 of the Bankruptcy Act (see 11 U. S. C. A. §205), providing for railroad reorganization, invades the rights of creditors to a much greater extent than does the act here in question. The Supreme Court sustained that act in Continental Illi-

nois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110, and section 77B (see 11 U. S. C. A. §207), providing for corporate reorganization, invades the rights of creditors more drastically than the act here. That section has been sustained as constitutional.

* * * * * * * * *

"It may be said that the long period of recognized equity receiverships applicable to both railroads and corporations which postponed the payment of debts of such corporations distinguishes sections 77 and 77B from the act here in question, but when we are dealing with the exercise of the constitutional power, it would seem that if the Congress can confer on the bankruptcy courts the power theretofore exercised by courts of equity corporate receiverships, a fortiori it may constitutionally confer on bankruptcy courts for farmers the same power as conferred for corporations.

"The act under consideration is not in its terms essentially different from the Minnesota Moratorium Law (Laws 1933, c. 339), which was sustained by the Supreme Court in the case of Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. The Minnesota act may be said to have been sustained as a valid exercise of the police power of the state, justified by an emergency, and that Congress has no such power; but in answer to this, the Congress may exercise its constitutional powers for any purpose for which a state may exercise its powers.

* * * * * * * * *

"In Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., *supra*, the court said: 'The fundamental and radically progressive

nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extension into a field whose boundaries may not yet be fully revealed."

One of the most cogently reasoned District Court decisions is *In re Bennett, supra.* We quote pertinent extracts:

"The original Frazier-Lemke Act (48 Stat. 1289) was held unconstitutional by the Supreme Court. * * * In the enactment of the statute now considered (the second so-called Frazier-Lemke Act), the Congress conscientiously and sincerely endeavored to obviate the defects pointed out in the original act by the Supreme Court. The most cursory reading of the new act reveals in every one of its provisions this highly commendable intent. I am not prepared to say that Congress did not succeed in accomplishing that purpose.

"The original act was held unconstitutional for that it deprived secured creditors of property without due process of law in violation of the Fifth Amendment. The chief question, therefore, to be considered in connection with the present act is this: Does this act deprive secured creditors of property without due process of law? Another question also has been

argued and must be decided: If the new act does not deprive secured creditors of property without due process of law, is it otherwise invalid as not within the power of Congress to enact laws upon the subject of bankruptcies? All that I can say upon that question, however, I said in the case of *in re* Jones (D. C.) 10 F. Supp. 165. I do not consider there is anything in the opinion in the Radford case which throws doubt upon the conclusion stated in that connection in the Jones case. The broad power of Congress concerning bankruptcies is sufficient to uphold the present act, provided it does not contravene the due process clause of the Fifth Amendment.

"The draftsman of the new act wrote the act with the opinion of the Supreme Court in the Radford case in his hand. It was pointed out in that opinion that the former act deprived the secured creditor of five separate property rights, to wit: '(1) The right to retain the lien until the indebtedness thereby secured is paid. (2) The right to realize upon the security by a judicial public sale. (3) The right to determine when such sale shall be held, subject only to the discretion of the court. (4) The right to protect its interest in the property by bidding at such sale whenever held. * * * (5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.' But it would be a superficial view of the opinion in the Radford case which would lead to the conclusion that the former act was held unconstitutional simply because it took away from the secured creditor one or more of these property rights. If that were the correct view, then the present act, of course, must be held unconstitutional, for it undoubtedly does take from

the secured creditor (1) the right to determine when the debtor's real estate shall be sold under mortgage or deed of trust and (2) the right to control the property during the period of default.

"The taking from the secured creditor of any of the five property rights set out by the Supreme Court was held by that court to be a violation of the due process clause of the Fifth Amendment only if thereby the security of the creditor was substantially impaired. I do not consider that it can be said beyond a reasonable doubt that the present act does substantially impair the creditor's security.

"The draftsman of the new act wrote the act not only with the opinion of the Supreme Court in the Radford case before him, but with the opinion of that court in Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, also in his hand. In the latter of these opinions the Supreme Court upheld a statute enacted by the Legislature of Minnesota granting a moratorium for a maximum period two years to owners of mortgaged real estate in the state upon condition that during the extended time for payment 'the reasonable rental value of the property involved' (should be used) 'in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness' (and so applied) 'at such times and in such manner as shall be fixed and determined and ordered by the court.' The right of the mortgagee to possess upon the expiration of the moratorium provided in the act was preserved.

"The validity of the Minnesota act was attacked on two grounds: First, on the ground that it impaired the obligations of contracts; second, on the ground that it took the property of the mortgagee

without due process of law. The Supreme Court upheld the act, notwithstanding both these provisions of the Constitution. Here, of course, we are not concerned with the constitutional provision prohibiting states impairing obligations of contracts.

"The due process clause of the Fifth Amendment is identical in its meaning with the due process clause in the Fourteenth Amendment which was considered in the Blaisdell case. If the Minnesota act upheld in that case is good as against the due process clause of the Fourteenth Amendment, the act here under consideration, if essentially it does no more than the Minnesota act, is good as against the due process clause of the Fifth Amendment.

"I do not consider that there is any vital distinction between the Minnesota act and the act here considered. The purpose of each is to effect a moratorium for persons indebted where the debts are secured by mortgages or deeds of trust.

"The Minnesota act effects a maximum moratorium of two years. The act here effects a maximum moratorium of three years. While an unlimited moratorium or a moratorium for an extended period undoubtedly would be invalid, it is hardly to be believed that the difference between two years and three is great enough to invalidate an act providing for a three-year moratorium which would be valid if the moratorium was for two years only.

"Both the Minnesota act and the act here provide that during the moratorium the secured creditor shall receive reasonable rental from the property. Both the Minnesota act and the act here authorize the court having jurisdiction to shorten the period of the moratorium. Both the Minnesota act and the act here provide for the ultimate realization by the mortgagee of the full value of the property covered by the mort-

> gage, to the full amount of the debts and accrued interest thereon. The differences between the acts are not substantial, and it cannot be said that, if the first does not violate the due process clause; the second does."

As indicated earlier in this discussion, practically all of the cases holding the new Frazier-Lemke Act unconstitutional do so on the ground that all five of the property rights of the creditor spoken of in the *Radford* case have not been adequately met.

It is earnestly submitted that this reasoning erroneously presupposes that the *Radford* case laid down *each* of these five property rights as a *sine qua non* for constitutionality. There is nothing in the opinion of Justice Brandeis which would command this view. Rather it is nearer the truth to conclude that the old Frazier-Lemke Act was violative of the Constitution *because so many of the rights of the secured creditors were ignored.*

It is more than probable that it was not intended in the *Radford* case to state a categorical list of rights with which Congress may not interfere. The cumulative effect of a disregard of *all* the rights referred to was to render the statute unreasonable and arbitrary and thereby violative of due process. As stated by Mr. Justice Cardozo in *Worthen v. Kavanaugh,* 295 U. S. 56, at 62 (1934):

> "Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A different situation is presented when extensions are so piled up as to make the remedy a mere shadow."

See comments on the new Frazier-Lemke Act in 30 Ill. Law Review 794 and 21 Cornell Law Quarterly 171.

(6) The Presumption of Constitutionality Is Strengthened by the Fact That Congress Made a Sincere and Studied Effort to Meet the Objections Raised by the Radford Decision.

It is admitted on all sides that the original Frazier-Lemke Act was hurriedly passed and slovenly drafted.

It is equally clear that the new amended Frazier-Lemke Act is the result of sincere deliberation, carefully drafted and approved only after being made thoroughly acceptable to the ablest constitutional lawyers of both the Senate and the House. The Senate Committee on the Judiciary made an exhaustive and careful analysis of the new Frazier-Lemke Act and was satisfied that it meets the requirements of the *Radford* case.

In part the report says:

> "In other words, in the amended subsection (s), the property is virtually in the complete custody and control of the court, for all purposes of liquidation. We feel confident that this meets all the requirements of the Supreme Court's decision. In fact, there is nothing new in this amendment that the Supreme Court has not already approved, not only in one decision but in many decisions, in bankruptcy cases.
>
> "The Supreme Court admits, in its decision in the *Radford case,* holding subsection (s) unconstitutional, that it is a law on the subject of bankruptcy, but also holds that it contravenes the fifth amendment. Under the grant of power given by the Federal Constitution, 'Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States,' the legislation here in question is legislation on the subject of bankruptcy. The only farmer who can take advantage of this act must be a bankrupt. A bankrupt is a financial wreck. The question of interest and

profits in bankruptcy proceedings is never considered. The question is one of salvaging, and saving what can be saved out of the wreck. In legislating on this subject it is just as much the duty of Congress to consider the unfortunate debtor as to consider the unfortunate creditors.

"This decision of the Circuit Court of Appeals was just recently confirmed by the Supreme Court, *in re Chicago, Rock Island & Pacific Ry. Co.* (293 U. S. 550, 55 S. Ct. 595, 79 L. Ed. 195, 27 Am. B. R. (N. S.) 715).

"It is not unconstitutional for a court of bankruptcy to take jurisdiction of encumbered, as well as unencumbered property, and sell same free and clear of any lien. In fact, a provision to that effect appeared in the Bankruptcy Act of 1867, and has been practiced in many cases under the present Bankruptcy Act.

"Neither is it unconstitutional to sell the property, and transfer the lien to the funds. That, again, has been done repeatedly by courts of bankruptcy.

"Nor is it unconstitutional to limit or prohibit the mortgagee from bidding at an auction sale. In fact, the mortgagee is generally prohibited from bidding at his own sale, unless that right is given to him by statute or by contract.

"All that the mortgagee or lienholder ever was, or is, entitled to in this country is the value of the property, as judicially determined, and there are many methods by which this may be determined. Subsection (s) employs them all, and leaves it in the discretion of the court.

"The time allowed in which to close up the bankrupt's estate in the amended subsection (s) is not unreasonable, and compares very favorably with the time required in bankruptcy and receivership cases

generally. The average of all cases heretofore has been approximately 2 years, and some cases have run as long as 12 years.

"Nor does this act establish a new principle by permitting the bankrupt to remain in possession of his own property, and pay the value as judicially determined for it. That has been determined by the Supreme Court in a number of cases. See the following cases: *Sparhauck v. Yerkes* (142 U. S. 1, 14); *In re Swofford Bros. Dry Goods Co.* (180 Fed. 549); *Burlimgham v. Crouse* (228 U. S. 459); *In re Reiman* (7 Ben. 455, 11 N. B. R. 21, 20 Fed. Cas. 11673, and 12 Blatch. 562, 13 N. B. R. 128, 20 Fed. Cas. 11675.)"

For a full report see Prentice-Hall Bankruptcy Service, Vol. 1, page 324 *et seq.,* Note 14.

See also 21 Cornell Law Quarterly, page 171 at 176 (December, 1935).

The constitutionality of this Act, because of the fate of its predecessor, was the paramount consideration during its progress through Congress. The consensus of Congressional opinion seems to be that the rights of the creditor have been fully protected. It is true that the mere stay of proceedings may appear a temporary loss but Congress has probably acted within its generally recognized power of determining public policy when it decides that because of the existing emergency such a loss would be less than that to be suffered from immediate action. It is difficult to predict with certainty the constitutionality of any legislation but a study of the bill, the discussions in Congress and the opinion in the *Radford* case inclines one to agree with Senator McCarran's remarks after reporting the bill for the Senate Judiciary Committee when he says:

"If any bill can be enacted which will be constitutional it will be a bill along these particular lines."

See 79 Cong. Rec., Aug. 21, 1935, at 14370, where Rep. Martin says: "The Senate debate, which I have read, indicates that it is the opinion of the ablest constitutional lawyers in that body that the bill is in its present form constitutional." *Report of Senate Judiciary Committee, Id.* Aug. 16, at 13961, "Subsection (s) employs them (methods of protecting creditor) all and leaves it in discretion of the court." Senator Logan, *Id.* Aug. 19, at 14102, "I agree that it (the new bill) contravenes no policy of the constitution." Senator Borah, *Id.* Aug. 19, at 14110, "* * * In my opinion, this bill is constitutional." This statement is especially significant when it is recalled that the speaker opposed the first bill on the grounds that it was unconstitutional. Rep. Lemke, *Id.* Aug. 23, at 14627, "All this bill does is to comply with the decision of the Supreme Court, giving the farmer an opportunity to get a breathing spell after he goes into bankruptcy." The bill passed the Senate on Aug. 19, 1935, without a dissenting vote after considerable debate as to its constitutionality.

See 79 Cong. Rec. July 29, 1935, at 12487: The Judiciary Committee of the Senate, composed of Messrs. Ashurst (Ch.) King, Neely, Long, Van Nuys, McCarran, Logan, Dietrich, McGill, Hatch, Burke, Borah, Norris, Hastings, Schall and Austin, including some of the most able lawyers in the upper house on constitutional questions, was unanimously in favor of the bill.

The presumption of constitutionality should in the light of this background not be treated as a mere shadowy formula devoid of meaning, but rather as a genuine doctrine of constitutional interpretation virtually controlling.

V.

CONCLUSION AND SUMMARY.

The judgment should be reversed because:

(1) The issue of constitutionality of section 75 (s) as amended (the new Frazier-Lemke Act) was prematurely raised and passed upon by the District Court, there being no showing that any property rights of appellees had as yet been injured or destroyed by the operation of the Act.

(2) The new Frazier-Lemke Act is constitutional because:

(a) It was passed by Congress only after a thorough study of the Radford decision and with a sincere effort to meet the requirements of that case.

(b) The new Frazier-Lemke Act cuts no deeper into creditors' rights than do other laws dealing with debtor-creditor relations which have been declared valid.

(c) The new Frazier-Lemke Act is reasonable and sets up a procedure *under direct court control* intended to fairly and equitably safeguard the creditors' rights and at the same time effect the financial rehabilitation of the debtor if feasible.

Respectfully submitted,

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No. 8092

In the United States
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

In the Matter of

WILLIAM DILLER,

Bankrupt.

William Diller,

Appellant,

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,

Appellees.

BRIEF FOR APPELLEE MICHAEL SHOEMAKER

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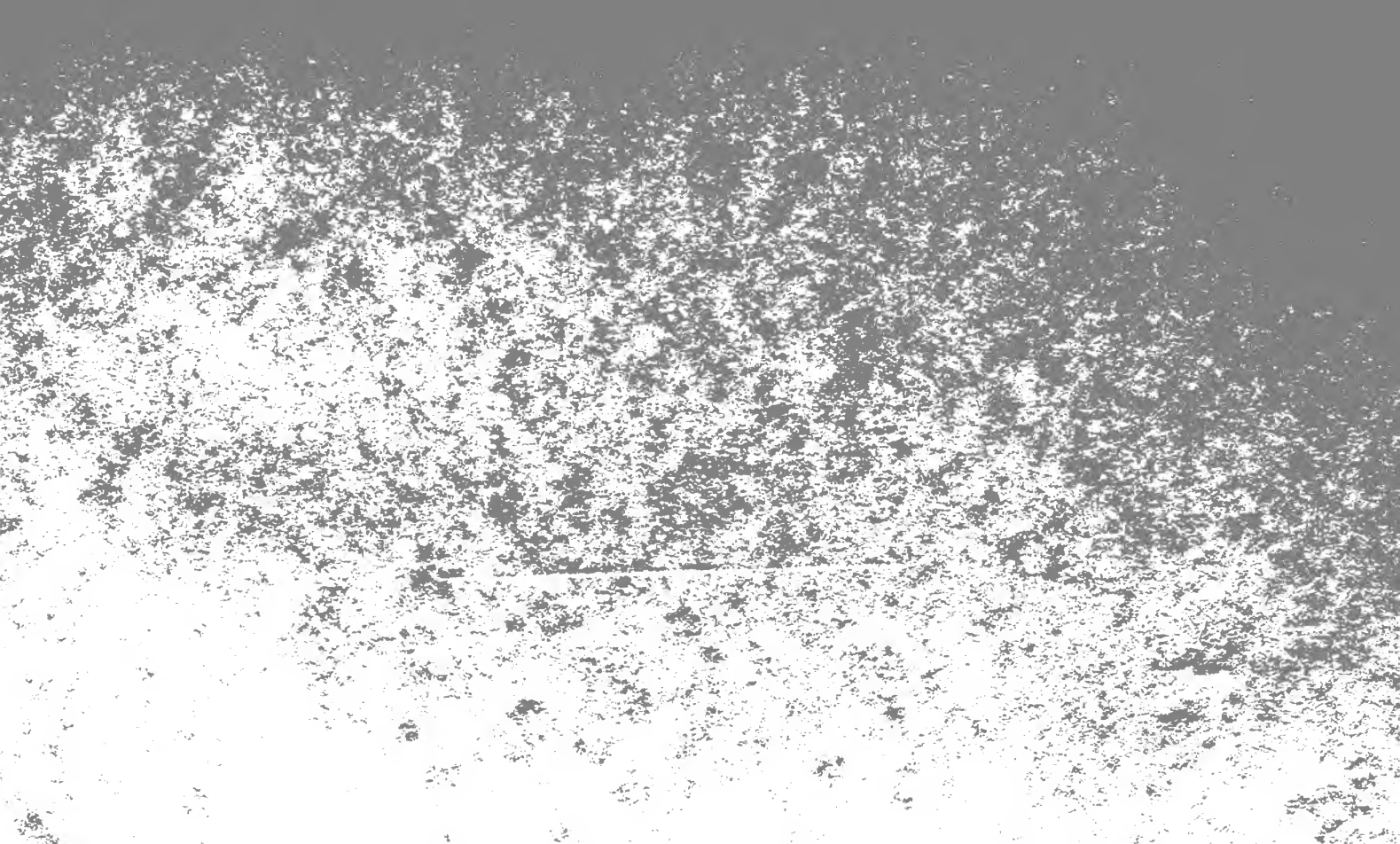

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Appellant,

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,

Appellees.

BRIEF FOR APPELLEE MICHAEL SHOEMAKER

I.

FACTS

The statement of facts contained in appellant's opening brief is condensed to the point of omitting certain particulars which appellee Michael Shoemaker deems material. These facts are as follows:

(a) In addition to the contention that subdivision "s" of

the National Bankruptcy Act as amended August 28, 1935, was unconstitutional, the petition of this appellee upon which the order now appealed from was made prayed for the dismissal of the proceeding on each of the following grounds:

1. The District Court had no jurisdiction to entertain appellant Diller's petition of June 24, 1935;
2. The proceedings were prosecuted in bad faith and solely for the purpose of hindering, delaying and defrauding this appellee;
3. The relation of debtor and creditor did not exist between appellant Diller and this appellee for the reason that appellant did not assume or agree to pay the note secured by the deed of trust held by this appellee.

(T. p. 17.)

(b) The restraint placed upon this appellee by the order of the District Court of September 5, 1936, denying to this appellee the exercise of his rights and remedies under his deed of trust continued uninterruptedly until that court made its order of December 13, 1935, dismissing said proceedings. (Tr. pp. 19-21 incl.)

(c) At the hearing pursuant to which the order appealed from was made, evidence was offered and received upon all of the grounds for dismissal set forth in this appellee's petition. (Tr. p. 20.)

(d) It appeared and was admitted at such hearing that the property covered by this appellee's deed of trust was appraised in the **original** subdivision "s" proceeding at $46,550.00. (Tr. pp. 17 and 20.)

(e) While the District Court in its **opinion** filed in this

matter gave as its reason for making the order which it did make its belief that the said amended subdivision "s" was unconstitutional, such order was an unqualified and unconditional dismissal of the proceedings prosecuted before it by the appellant Diller. (Tr. pp. 33-34.)

(f) As will appear from the records of this court, and more particularly from its minutes of February 3, 1936, appellant Diller sought an opportunity to supersede the judgment appealed from pending the appeal and was by this Court accorded an opportunity to do so upon posting a supersedeas bond fixed by this Court on said 3rd day of February, 1936, at which time inquiry was addressed from the bench of this Court to counsel for appellant Diller as to whether or not said appellant was able to post and intended to post such bond inasmuch as this Court was not disposed to make an order even temporarily superseding such judgment unless appellant was able to post and intended to post such bond, and thereupon in open court appellant represented his ability and intent to post such bond and on the basis of such representation this Court temporarily superseded the judgment, but during such period so allowed for the filing of such bond, appellant failed to post the same and used said period solely for the purpose of initiating an entirely new proceeding under section 75 of the National Bankruptcy Act.

(g) Appellant Diller having voluntarily admitted in his opening brief (page 7, para. no. 20) that this appellee has caused a foreclosure sale to be held under the deed of trust held by him resulting in a deficiency in connection with which this appellee has commenced an action to recover such deficiency in the state court, he may not object to and

has indeed by necessary implication invited the placing before this court in similar manner of the further fact that in such state court action appellant herein has filed a verified answer prepared by his present counsel in this case in which he solemnly swears that he never assumed or agreed to pay the obligations set forth in the note and deed of trust held by this appellee or any of them.

(h) Although the question of the constitutionality of said amended subdivision "s" was attacked in the pleading of this appellee in the District Court and the decision of said court was placed upon the ground of the unconstitutionality of said statute, appellant Diller did not present to the said District Court, or in his assignment of errors upon appeal, or at any time prior to filing his opening brief herein, the objection that the raising and/or consideration of such constitutional question was premature. (Tr. pp. 6-22, incl. and pp. 38-41 incl.)

II.

THE ISSUES.

From the foregoing statement of additional facts, it is clear that three issues are presented for determination upon this appeal:

(A) **Should the judgment of dismissal entered herein be affirmed irrespective of the constitutional question?**

(B) **Should it be determined herein that the constitutional question was prematurely raised and adjudicated?**

(C) **Was the constitutional question correctly adjudicated by the District Court?**

III.

ARGUMENT

(A) THE JUDGMENT OF DISMISSAL ENTERED

HEREIN SHOULD BE AFFIRMED IRRESPECTIVE OF THE CONSTITUTIONAL QUESTION.

The Supreme Court of the United States has established the rule that even though it may appear that the court below may have erred in dismissing a proceeding, yet if, on appeal from such order, the appellate court finds any other ground upon which such dismissal should have been made, it must affirm the judgment.

Ridings v. Johnson, 128 U. S. 212.

There are not less than three grounds upon the basis of which the dismissal entered herein should be affirmed in addition to the ground expressly relied upon by the District Court.

1. The Dismissal Should Have Been Made Because No Validly Initiated Proceeding Was Pending Before the Court.

Upon the admitted facts contained in paragraphs 7, 8, 9 and 10 of appellant's statement of the facts (opening brief pp. 4 and 5), appellant Diller's original section 75 proceeding was dismissed and the proceeding dismissed herein was **not** a re-instatement of **that** proceeding under the terms of the amended subdivision "s", but was a purported **new** proceeding commenced several months prior to the enactment of the new subdivision "s" wherein Diller attempted to secure a re-adjudication of the identical matters already submitted and adjudicated in the original section 75 proceeding.

The District Court had no authority to entertain such new proceeding which was the **only** proceeding pending before it on and after June 24, 1936.

In Re Archibald, 14 Fed. Supp. 437.

2. The Dismissal Should Have Been Made Because the Proceeding Could Not Be Prosecuted in Good Faith.

It stands admitted that delinquent principal on this appellee's note amounted to $48,000.00. Delinquent interest amounted to $6,000.00 more. On top of that, large sums of taxes were unpaid and a lien against the property. Taxes for an ensuing year were a lien and about to become delinquent, in part at least. Bearing these facts in mind, the outstanding fact bearing upon the good faith of appellant is the further fact that in the original subdivision "s" proceeding the property was appraised at but $46,550.00. Appellant himself is at great pains to impress upon this Court the fact that such appraisement was not one confined to the **market value** of the property, but was one addressed to its **intrinsic** value. (Opening brief, p. 17.)

Where, then, can appellant stand but precisely in the position of a "dog-in-the-manger"? He cannot even claim for himself that extremely questionable "good faith" of the property owner claiming (at the expense of his creditor) the right to a delay in order to speculate upon the recovery of the real estate market. He is pilloried squarely in the position of a debtor holding property so burdened with debt that no reasonably prudent or intelligent man would seek to retain it for its own sake and who therefore can only be pictured as holding onto it to further harrass, annoy and delay a creditor already bound to take a loss on the transaction. The courts have repeatedly held that they will not permit themselves to be made use of as the lethal weapon in such a "hold-up" but will dismiss the proceeding on the ground of bad faith.

In Re Borgelt, 10 Fed. Supp. 113 (Affirmed November 23, 1935, in 79 Fed. (2) 929);

In Re Hilliker, 9 Fed. Supp. 948;

In Re Cosgrave, 10 Fed. Supp. 672;

In Re Loop, C. C. H. (New Matters) par. 4001;

In Re Byrd, C. C. H. (New Matters) par. 4064;

In Re Slaughter, 13 Fed. Supp. 893.

The element of bad faith is extremely persuasive in this case in view of the events subsequent to the granting by this Court of a temporary **supersedeas** solely for the purpose of permitting appellant to post a permanent **supersedeas** bond. After using this period for the sole purpose of harrassing his creditors by filing an entirely new section 75 proceeding, appellant failed to post the bond, and, there being thereupon no **supersedeas,** this appellee caused the property to be sold by the trustee under the terms of his deed of trust. Under the decision of this court rendered on June 1, 1936, in **Heffron v. Western Loan & Building Co.,** 84 Fed. (2) 301, title passed to the purchaser under such sale; and if any reversal of the judgment herein can be made effective such result can only be accomplished by a setting aside of such sale. Conceding that such action might be taken in an appropriate case, the bad faith and total want of equity in appellant disclosed by the record herein militate conclusively against the equity of any such procedure in the instant case. There is therefore clear ground for affirmance of the judgment of dismissal on the ground of bad faith.

3. The Dismissal Should Have Been Made Because No Debtor-Creditor Relation Exists Between Appellant and This Appellee.

Appellant Diller being unquestionably on record under

oath as asserting that he did not assume or agree to pay the note or deed of trust held by this appellee, no such debtor creditor relationship ever existed between them as would permit of the application of the terms of section 75 of the National Bankruptcy Act in the administration of the property subject to such note and deed of trust.

In Re Hanley, 9 Fed. Supp. 463, point 2.

(B) IT SHOULD NOT BE DETERMINED HEREIN THAT THE CONSTITUTIONAL QUESTION WAS PREMATURELY RAISED AND ADJUDICATED IN THE LOWER COURT.

1. Appellant Failed To Present In a Timely Manner His Contention That the Constitutional Point Was Considered Prematurely.

Appellant did not prior to filing his opening brief on this appeal present the claim that the constitutional question was prematurely considered by the lower court. On the contrary, he joined in arguing and submitting the constitutional question to the lower court on its merits.

Generally speaking, objections not made in the lower court and not assigned as error cannot be considered in the appellate court.

U. S. Supreme Ct. Rep. Dig., Title Appeal & Error, sec. 1104, **et seq.;**

De John v. Alaska etc. Coal Co., 41 Fed. (2) 612;

Wood v. A. Wilbert's Sons etc. Co., 226 U. S. 384;

More specifically, it is held that where the decision of the lower court is challenged in error and the attention of the lower court was not called to the alleged error, such error will not be considered by the appellate court.

Montana R. Co. v. Warren, 137 U. S. 348.

More specifically still, where a party joins in presenting a question to the lower court on the merits, he will not be heard to say for the first time on appeal that the court should not have determined the question.

U. S. Supreme Ct. Rep. Dig., Title Appeal & Error, sec. 1118 and sec. 1121;

Walker v. Beal, 9 Wall. 743.

2. If the Propriety of the Action of the Lower Court In Considering the Constitutional Question Be Analyzed On Its Merits, It Appears That Such Consideration Was Wholly Proper.

Appellant's suggestion that the first appeal in the Pamp case (**United States National Bank of Omaha v. Pamp,** 77 Fed. (2) 9) has a bearing upon the merits of the question now under consideration is quite misleading. The appeal in that case involved an order made in an "a" to "r" proceeding under section 75 and the contention having been made that subdivision "s" was unconstitutional, the court quite properly held that inasmuch as the case might never reach subdivision "s" and as subdivision "s" was entirely severable from the "a" to "r" proceedings, it would be time enough to consider the constitutionality of subdivision "s" if and when the case progressed into proceedings under that subdivision. In the present case, proceedings had admittedly progressed into subdivision "s" on September 21, 1935.

It was only thereafter that this appellee raised the constitutional question as to that section for the first time. Under unimpeachable authority, it was this appellee's duty to raise the question at the first possible opportunity on pain of waiver of the right to do so at all.

12 Corpus Juris, p. 785, para. 217.

Had this appellee participated in the proceedings, as he could not well avoid doing under the provisions of the subdivision, without raising the constitutional question, he would be held to have waived it.

12 Corpus Juris, p. 773; para. 199;

Detroit etc. R. Co. v. Osborn, 189 U. S. 383.

Appellant's assumption that this appellee was not presently injuriously affected by the application of the statute is entirely without support in the record. Admittedly, this appellee was denied by the District Court's order of September 5, 1935, the right to enjoy his rights and remedies under his deed of trust. Admittedly, also, from and after September 21, 1936, such order was operative, and operative solely, under and by virtue of the terms of the statute under attack. It is obvious from the mere recital of this situation that this appellee was suffering immediate injury by application of the statute and that nothing short of an order of dismissal or an order granting leave to foreclose could relieve him from the continuance of such injury. Such injury is all that appellee was required to show to qualify to raise the constitutional question.

12 Corpus Juris, p. 763, Note 68;

Savage v. Jones, 225 U. S. 501.

There is no merit in appellant's contention that appellee had not actually suffered injury under the specifically obnoxious portions of the statute because the court had not yet reached the point of actually making the three year moratorium adjudication. Not only was appellee subject to the actual restraint of the court pending the actual making of the moratorium adjudication, but he was directly and imme-

diately threatened with the making of such adjudication. It is entirely sufficient to qualify a person to raise the constitutional question with respect to a statute that he is **threatened** with injury in contra-distinction to an immediate suffering of injury.

Utah Power & Light Co. v. Pfost, 286 U. S. 165 at 186, headnote 10;

Crampton v. Zabriskie, 101 U. S. 601;

Washington Water Power Co. v. City of Coeur D'Alene, 9 Fed Supp. 263.

Even if it could be urged that the actual restraint to which appellee was immediately subject under the order of September 5th, was not a restraint under the obnoxious terms of the statute and even if it could be conceded in the face of the obviously inconsistent fact that appellee was not threatened with direct and immediate injury under the obnoxious terms of the statute, the fact that he was restrained at all under the toils of the statute qualified him to show that the statute as a whole was void on account of obnoxious provisions therein even if he was not personally threatened with immediate injury from such specific provisions.

State v. Louisiana Coca-Cola Bottling Co., Ltd., 124 S. 769, (La.);

State v. Cumberland Club, 188 S. W. 583 (Tenn.), headnote 5;

State v. Bengsch, 70 S. W. 710 (Mo.), headnote 9;

12 Corpus Juris, p. 764, note 72.

We have heretofore considered the question presented on the authority and reasoning that would be applicable to it as a question raised **de novo.** The question is, however, settled by the so-called Radford case (**Louisville Joint Stock**

Land Bank v. Radford, 295 U. S. 555.) In the Circuit Court of Appeals decision in that case (74 Fed. (2) 576), the court considered favorably contentions along the line of those made by appellant herein. (Points 8 and 9 of the Circuit Court of Appeals' opinion.) The Supreme Court, however, had no hesitation in considering the constitutional question on its merits. And it is particularly interesting to note that while the general literature of the Radford case shows that various and sundry proceedings were had in the lower courts under the provisions of subdivision "s" of the statute, the precise matter in which **certiorari** was granted by the Supreme Court, and in which the decision of the Supreme Court was rendered, involved a presentation of the constitutional question simply upon the bankrupt's petition and the creditor's answer raising the question at the first opportunity for pleading.

(C) THE CONSTITUTIONAL QUESTION WAS CORRECTLY ADJUDICATED BY THE DISTRICT COURT.

1. Re-Statement of the Points For Argument.

The argument of appellant addressed to the question of the constitutionality of the amended Frazier-Lemke Act falls into two main parts.

The first part of such argument advances the contention that the 1935 statute so far avoids the taking of private property rights admittedly taken by the 1934 statute that the 1935 statute may not be condemned upon the authority of the Radford case **(Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, 79 L. Ed. 1593) which condemned the 1934 statute. This argument will be answered in subdivision "2" of this division of our brief.

The second part of such argument advances the contention that even if the 1935 statute does involve a taking of private property rights, such taking may be sustained by application of the theories upon the basis of which the Supreme Court of the United States has sustained a similar taking by moratory legislation enacted by the several states. **(Home Building & Loan Ass'n. v. Blaisdell,** 290 U. S. 398.) This argument will be answered in subdivision "3" of this division of our brief.

A third consideration affecting the constitutionality of the 1935 statute has not been considered by appellant in his opening brief. We refer to the fact that this statute lacks that universality of geographical application and that uniformity in its application to a given class of persons essential to the validity of national legislation. This consideration will be presented in subdivision "4" of this division of our brief.

Before passing, however, to take up the three points of argument just outlined, we desire to take brief cognizance of the attempt of appellant to win sympathetic consideration for the amended Frazier-Lemke Act, by stressing the presumption of constitutionality arising in connection with all legislation and by emphasizing a picture of the Congress consciously and conscientiously struggling with the application of constitutional principles in the matter of the drafting of the statute.

The Constitution is of course the supreme law. Any act of the Congress which is violative of this supreme law and the rights and interests protected thereby, is unconstitutional.

While the general rule may be that there is a presumption that the Congress acts in conformity with the constitution,

such presumption is readily rebuttable and must always be considered in the light of another well settled rule to the effect that constitutional provisions for the protection of persons and property "are to be liberally construed," and further that it is the duty of the courts "to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."

Byars vs. United States, 273 U. S. 28, 32.

United States vs. Lefkowitz, 285 U. S. 452, 464.

We respectfully submit that the presumption relied upon by appellant in this connection has no application to the facts before the court on this appeal.

2. The Amended Frazier-Lemke Act Does Deprive This Appellee of Property Rights In Violation of the Principles Announced In the Radford Case.

At the time at which appellant Diller initiated these proceedings, appellee owned a note secured by a power-of-sale deed of trust covering California real estate claimed as an asset by appellant. The entire principal sum was delinquent, substantial sums on account of interest were delinquent, and the property securing the note was in jeopardy by reason of the non-payment of substantial amounts of taxes. Prior to the submission of the motion to dismiss on the ground (among others) of the unconstitutionality of the amended Frazier-Lemke Act, more than three months had elapsed following recording by this appellee of a notice of breach and election to sell pursuant to the provisions of section 2924 of the Civil Code of the State of California.

Appellant does not deny, and indeed admits, that under the laws of the State of California appellee was at that moment entitled to rights analogous to each of the five rights

listed by the court in the Radford case. That is to say, appellee then possessed, subject only the impairments attempted in the amended Frazier-Lemke Act:

1. The right to retain the lien until payment of the indebtedness secured thereby;
2. The right to realize upon the security by the manner of sale authorized by the California law;
3. The right to determine when such sale shall be held subject only to such interference as may result from an exercise by a court of competent jurisdiction of recognized equity powers;
4. The right to require the holding of such sale in the form of fair competitive sale at which the amount of the secured indebtedness could be bid for the property; and
5. The right to control meanwhile the property during the period of default, subject only to such interference as may result from an exercise by a court of competent jurisdiction of recognized equity powers and to have the rents and profits collected by a receiver and applied to the satisfaction of the debt.

Two propositions of cardinal importance with respect to these five rights were definitely settled by the Radford case —if, indeed, it can be said that there was ever any serious doubt as to either of them—namely:

(1) That each and every one of these five rights constitutes a property right protected by the Fifth Amendment to the Constitution; and

(2) That the power of the Congress to enact bankruptcy legislation is limited by such Fifth Amendment.

Appellant's opening brief has the effect of confusing the reader as to these two cardinal points by setting forth long, technical and detailed comparative analyses of the 1934 and 1935 acts as a basis for the contention that the Radford case, while undoubtedly establishing the law with respect to the 1934 act, has no application to the 1935 act. But the fact remains that, irrespective of the details of the particular statute to which they may be applied, these two cardinal points are definitely, explicity and finally established by the Radford case.

It can only remain, therefore, to determine whether or not the amended Frazier-Lemke Act takes any one of these five property rights. Were any doubt, ambiguity or uncertainty to be encountered in making such determination, it might be material (in the sense of being persuasive) to make detailed technical comparisons of 1934 act and the 1935 act for the purpose of showing the close analogies between them as a basis for using as an authority herein the decision in the Radford case holding that the 1934 act did take similar rights.

However, there is not the slightest doubt or ambiguity concerning the effect of the 1935 act as a taking of at least four of these five rights and the only possible uncertainty is a legal one as to the definition accorded by the Supreme Court to the term "lien" as used in the description of the property right heading the list of rights above set forth. We shall, accordingly, briefly demonstrate the taking in each instance by direct reference to the 1935 act and resort to the opinion in the Radford case for a definition of the term "lien" in connection with the appellee's right to "retain" his lien.

Taking up the rights stated in inverse order, there is not the slightest doubt whatsoever but that the fifth right listed, that is the right to control the property during the period of default, is distinctly, directly and explicitly taken by the amended Frazier-Lemke Act. This, as a matter of fact, is conceded by appellant on the bottom of page 25 of his opening brief. The concession is coupled with the contention that the taking is to be justified on the theories under which moratory legislation enacted by the several states has been sustained. Inasmuch as this latter contention is dealt with exclusively in the next subdivision of our brief, the concession made by appellant would permit us close the present branch of our argument at this point but for the further suggestion that the Radford decision and the principles of constitutional law which it expounds are to be construed as permitting the Congress to do a **little** taking, or to take **one** property right, but as forbidding the piling up in the same statute **several** takings.

This amazing contention which appellant makes in italics on page 43 of his opening brief is entirely unsupported by authority. The case of **W. B. Worthen Co. v. Kavanaugh,** 295 U. S. 56, cited in this connection was not concerned with the problem which is now engaging our attention. It was not concerned with determining whether there was **any** "taking" of property. It was necessarily conceded on all sides in that case that there was a taking. The problem there was one of application of the **police powers of states** more particularly discussed and defined in the next subdivision of this brief under which the test to be applied by the court was not whether or not there was **any** taking, since admittedly **some** taking by the states is justified under their re-

served police power, but whether there was such a **substantial** taking as to be oppressive and therefore improper even in the exercise by the states of such police power.

In the present case, and in the Radford case, the question presents an application of the Fifth Amendment to an assumption by the Congress to exercise a delegated power, a situation which, as we shall presently show, is entirely different. As was stated in **In re Davis,** 13 Fed. Supp. 221, the question is not one of "the degree or percentage of constitutionality of a statute, enacted with special reference to that which the Supreme Court has declared to be the law" but whether there is any taking of a substantial right inherent in the security created under the state law defining the lien rights claimed by the creditor. Each and every one of the rights herein listed was recognized by the Supreme Court in the Radford case as a substantial right of the character just designated. There is no basis whatsoever any where in the opinion, whether the same be taken as a whole or broken down into its parts, which would justify the conclusion that one of them was more important than another or that one or any other number less than all of them might be taken without violation of the constitution or that such violation resulted only from a group violation of several or all of them.

But other substantial rights are taken by the 1935 statute, among them the right to determine when sale shall be held subject only to such interference as may result from an exercise by a court of competent jurisdiction of recognized equity powers. The taking of this right, also, is expressly conceded by appellant at the bottom of page 24 of his opening brief and again he attempts to justify the taking upon

grounds to be considered in the next subdivision of our brief. It must suffice to point out here that the taking is another taking of substantial rights inherent in the security created by the California law. Under the California law, appellee was entitled to determine upon an immediate exercise of his power of sale. At the sale so to be held, he was entitled to a sale of the property on terms entitling the purchaser to immediate possession. Both of these rights are taken from appellee by the statute which makes a gift of a three year leasehold estate to the debtor during which time no sale may be held and no purchaser let into possession.

Again, the statute takes the right of appellee to realize upon the security by the form of sale authorized by the California law. Appellant does not concede this taking as he was compelled to concede the two takings last referred to. The reason for appellant's position in this behalf is to be found in a mis-conception and too literal application of the language of the Radford decision. It is quite true that the language of that decision, applying as it did to the precise and particular case before the court in that specific instance, held that the form of sale to which the Louisville Joint Stock Land Bank was entitled in that case was a "public judicial sale". It is also true that in framing the 1935 Frazier-Lemke Act the Congress departed from the provisions of the 1934 statute so that ultimately, and subject to the other takings herein referred to, the lienholder might be entitled to a public judicial sale. But the cardinal point which both the congressional draftsmen and appellant overlook is that the actual decision in the Radford case is that the rights of the creditor in that case were to be measured by the laws of the state wherein the real property was located, that is to say in that

case by the laws of the State of Kentucky, and the laws of the State of Kentucky gave to the creditor a right to a "public judicial sale." Applying the same fundamental reasoning to the present case, the rights of appellees are to be measured by the laws of the State of California and the laws of the State of California do not limit trust deed holders to "public judicial sales" but permit sales under the power of sale contained in such deeds thereby vesting in the trust deed holder a right to a sale which in its form and incidents differs substantially from a public judicial sale. That the statute attempts to take this right from appellees is unarguably clear.

Finally, this appellee respectfully submits that the right to retain his lien until the indebtedness is paid is taken by the 1935 Frazier-Lemke Act. Appellant denies such taking on the ground that as a matter of form the lien is continued of record against the property during the period of the three year estate created for the benefit of appellant and presented to him as a gift by the terms of the statute. The cardinal point in the decision of the Supreme Court in the Radford case is that in determining whether or not the lien is retained the court will look through the form to the substance and if the substance is so impaired as to leave the form a mere hollow shell, it will be held that the creditor is deprived of his lien. It is true that in the Radford case the court took account, among other things, of the fact that the 1934 act purported to authorize an extinguishment of the creditor's lien on the land and the attachment of such lien to a fund. And appellant argues that because the 1935 act avoids this procedure, it necessarily and **ipsi facto** follows that the lien is "retained" under the 1935 act in distinction to and in con-

trast with the situation under the 1934 act struck down in the Radford case. This matter of form, however, was by no means vital. As appellant points out on page 45 of his opening brief, the Supreme Court itself has not hesitated to approve statutes authorizing sales of real property free from mortgage and trust deed liens and transferring the liens of the holders of such instruments to the proceeds of the sale under fair and duly safeguarded procedure which insures the retention of the lien **in substance.** It was the impairment of the lien **in substance** rather than any incidental impairment **in form** that lay at the root and basis of the condemnation of the statute in the Radford case. In approaching a consideration of such impairment, the court looked both forward and backward from the unescapable conclusion that the real (as distinguished from the obvious) purpose of the act was not to effect a bankruptcy administration but to create delays and prolong possession of the mortgagor to promote his interest at the expense of the mortgagee. (Page 597 of the opinion.) In further evaluating the extent to which the delay so given affected the substance of the lien, the court took into account the danger of accumulation of unpaid taxes and interest, the danger of waste and deterioration in value, the loss of ability to develope and realize a fair rental and the loss of opportunity to sell the property during the period of the delay.

It requires no extended or technical detailed comparative analyses of the 1934 and 1935 statutes to reach the conclusion that both acts are conceived and drafted with a single aim, intent, purpose and effect, namely to create an equitable estate in land for a given period of years at the expense of the mortgagee or trust deed beneficiary and to make a pres-

ent of such estate to the mortgagor or trustor and that under the one act as well as under the other the period of the life of such estate is beset with identical dangers of accumulation of unpaid taxes and interest, identical dangers of waste and deterioration in value, indentical loss of opportunity to manage the property and develope and realize adequate rentals, and identical loss of opportunity to sell. That being so, the 1935 act just as surely takes from the appellee the right to retain his lien as did the 1934 act.

Large numbers of decisions have reached the same conclusion upon similar reasoning. Naturally, we consider these cases more soundly reasoned than the cases collected on page 29 and following of appellant's opening brief. We recognize, however, that it is the exclusive prerogative of the Court to determine which line of cases rests upon the sounder foundation of law and logic. We feel that it would be an impertinence to attempt to labor the point by an insistent analysis of the two lines of decisions addressed to the constitutional questions here presented. We, therefore, submit without further comment the line of authorities determining that the amended Frazier-Lemke Act is unconstitutional. It comprises the following cases:

United States National Bank v. Pamp, 83 Fed. (2) 493;

Lafayette Life Insurance Co. v. Lowmon, 79 Fed. (2) 887;

In Re Diggle, C. C. H. (New Matters) sec. 3951;

In Re Mullikin, C. C. H. (New Matters) sec 4000;

In Wogstad, 14 Fed. Supp. 72;

In Re Schoenleber, 13 Fed Supp. 375;

In Re Tschoepe, 13 Fed. Supp. 371;

In Re Davis, 13 Fed. Supp. 221;
In Re Lindsay, 12 Fed. Supp. 625;
In Re Sherman, 12 Fed. Supp. 297;
In Re Young, 12 Fed. Supp. 30.

3. The Amended Frazier-Lemke Act May Not Be Sustained By Application of the Theories Which Justify Enactment of Moratory Legislation By the Several States.

Assuming that, as we have established in the next preceding subdivision of this brief, the amended Frazier-Lemke Act invades property rights, takes property without due process of law and impairs the obligation of contract, appellant presents to this court the following argument:

1. Moratory legislation enacted by the State of Minnesota which does these identical things was upheld by the Supreme Court of the United States in the Blaidsdell case **(Home Building & Loan Ass'n. v. Blaisdell,** 290 U. S. 398, 78 L. Ed. 413);
2. The Congress is limited by the Fifth Amendment in exactly the same manner and degree and to no greater extent than the several states are limited by the Fourteenth Amendment;
3. Therefore the Blaisdell case furnishes a precise yardstick for measuring the constitutionality of the amended Frazier-Lemke Act.

Were we to concede the second proposition in this speciously plausible framework of reasoning, the conclusion would logically follow. The proposition, however, is so manifestly at variance with the classical distinction between the exercise by the Congress of delegated powers and the exercise by the several states of reserved powers, that we would not concede the necessity of a formal argument in re-

ply but for the fact that appellant presents in support of his proposition the opinion of the District Court for the Western District of Kentucky in the case of **In re Reichert,** 13 Fed. Supp. 1. (Opening Brief, pages 33 to 39 incl., and particularly the bottom of page 38.)

It is needless, we think, to undertake to review in detail the decisions of the United States Supreme Court cited in the Reichert case in support of the proposition relied upon by appellant. Examination of these decisions discloses that they are without exception based upon regulations prescribed by the Congress in the exercise of the great substantive powers granted to it by the Constitution, such, for example, as the power to regulate commerce between the states, or foreign commerce, or the leasing and use of real estate in the District of Columbia during emergencies covered by the world war, or some similar substantive power. All that is meant by these decisions cited in the Reichert case is that the Congress has plenary authority to exercise the powers expressly granted by the Constitution.

But, specifically, the police power, which is precisely and exactly the power under which the Minnesota Moratorium considered in the Blaisdell case was sustained, is a power not granted to the Congress but reserved to the states.

12 Corpus Juris, 910, par. 417.

The police powers reserved by the states embody what Chief Justice Marshall aptly described in **Gibbons vs. Ogden,** 9 Wheat. 1, 203, as "that immense mass of legislation which embraces everything within the territory of a state not surrendered to the federal government."

The United States Supreme Court in **United States vs. Butler,** .....: U. S. .....; 56 S. Ct. 312, 323, 324; 80

L. Ed. Ad. Op. 287, 297, and **United States vs. Constantine,** 296 U. S. .....; 56 S. Ct. 223; 80 L. Ed. Ad. Op. 195, 199, has recently had occasion to lay particular emphasis on the fact that the states have not surrendered their police powers to the federal government, and that such powers are reserved to the states and protected by the Tenth Amendment.

There are many other decisions to this same effect. Out of these many other decisions, however, we desire to call the attention of the court to two in support of this proposition, to-wit:

Hammer vs. Dagenhart, 247 U. S. 251, 273, 274 and 275, and

United States vs. Dewitt, 9 Wall. 41, 44 and 45.

It follows, therefore, that appellant has quite manifestly failed to sustain the proposition that the rules expressed in the Blaisdell case with respect to the exercise by the states of the reserved police power may be applied to the exercise by the Congress of quite different powers.

The distinction may be most readily grasped by quoting at some length the brief discussion on the subject of police power as limited by the constitution contained in section 106 of the article on Constitutional Law contained in volume 5 of California Jurisprudence, page 695:

> "An exercise of the police power, legitimate in other respects, cannot be condemned as invalid on the ground that it is an unlawful or unauthorized invasion of the right of property, or upon the ground that it is a taking of property without due process of law, or that it deprives persons of the equal protection of the laws contrary to the fourteenth amendment of the constitution

of the United States, or that it impairs the obligation of contracts. Neither the fourteenth amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develope its resources, and add to its wealth and prosperity. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. x x x x x x However, such regulations must be reasonable, devoid of oppression, and must not amount to an improper or arbitrary infringement upon the constitutional rights of individuals."

This, then was the yardstick applied in the Blaisdell case: Was the Minnesota statute one which a legislative body might within the limits of reasonableness determine to be appropriate to increase the industries of the state, develope its resources and add to its wealth and prosperity? Was it devoid of oppression? Did it avoid arbitrary infringement of individual rights? The Supreme Court held that it did all of these things, and, therefore, irrespective of the fact of whether or not it invaded the rights of property, or took property without due process of law or impaired the obligation of contracts, it was, of course, sustained.

But the very essence of the decision in the Radford case was that a **different yardstick** is applicable to an act of Congress. And in that behalf, the court expressly and explicitly stated in language so plain that all who run may read that

the Congress **may not** enact a statute which invades rights of property or a statute which takes property without due process of law.

Undiscouraged, however, by this plain, unambiguous and explicit language, appellant insists that the power to enact such statutes may be found to exist as a power incidental and ancillary to the delegated power of the Congress to enact bankruptcy legislation. If this theory had not been expressly and unmistakably refuted in the Radford case, the refutation thereof would follow as a necessary corollary from the application of almost unnumbered decisions of the Supreme Court.

In **United States vs. Butler,** .....U. S. ....., (56 S. Ct. 312, 80 L. Ed. Ad. Op. 287), it is said at page 296, that:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

In this Butler case, an act by which the Congress assumed to exercise its taxing power was held to be a void act for the reason that it invaded the rights reserved to the states in that the real purpose of the act was to regulate and control crop production in the several states whereas no such power had ever been conferred on the federal government.

A similar fate befell the child labor tax act in **Bailey vs. Drexel Furniture Co.,** 259 U. S. 20, this statute being one by which the Congress undertook to regulate and control the matter of child labor under the guise of exercising its taxing power.

In **Linder vs. United States,** 268 U. S. 5, 17, it was held that the Congress could not, under the guise of exercising its taxing power, regulate and control the practice of a profession.

The principle recognized and applied in these cases has also been recognized and applied in many other cases including **Frick vs. Pennsylvania,** 268 U. S. 473 at 495, and **Nichols vs. Coolidge,** 274 U. S. 531, and 541, wherein the courts have held that the Congress cannot by indirection accomplish that which it is forbidden to do directly.

The taxing power of the Congress is of far greater importance than the power to enact laws on the subject of bankruptcies. This latter power at the most is a matter of expediency and convenience. Since the adoption of the Constitution as the fundamental law of our land, national bankruptcy laws have been in effect for little more than one-third of the entire period. On the other hand, the taxing power, and the exercise thereof, is absolutely essential to the existence of the nation as a sovereign power.

When it is considered, therefore, that the acts of the Congress above noted were held to be void acts on the ground that they were encroachments on the powers reserved to the states, nothwithstanding the fact that Congress in the enactment of these acts had assumed to act under its broad power of taxation, it inevitably follows that so much the less does the Congress have power to encroach upon the sovereign police powers reserved to the states by undertaking to regulate and control the internal affairs of the state under the pretext of exercising the power to enact laws on the subject of bankruptcies.

Included in the police powers reserved to the states are those great fundamental powers by which each state is authorized to determine the terms and conditions, nature, extent and validity of mortgage liens on lands therein and the rights of mortgagees thereunder, and also the power to determine the terms and conditions, nature, extent and val-

idity of the remedies provided by its laws for foreclosing such mortgage liens and directing the sale of the lands in satisfaction thereof.

In **M'Cormick vs. Sullivant,** 10 Wheat. 192, it is said (p. 202) that:

> "The title and disposition of real property is subject to the laws of the country where it is situated which can alone prescribe the mode by which the title to it can pass from one person to another."

In **United States vs. Fox,** 94 U. S. 315, it is said (p. 320) that:

> "The title and modes of disposition of real property within the state . . . . are not matters placed under the control of federal authority."

In **DeVaughn vs. Hutchinson,** 165 U. S. 566, it is said (p. 570) that:

> "To the law of the state in which the land is situated, we must look for the rules which govern its descent, alienation and transfer."

In the Lowmon case, 79 Fed. (2nd) 887 (CCA 7), it is said at page 891 that "where property rights are regulated by the state law, the Congress has no right under the bankruptcy power to alter those rights," and further that while federal courts may be authorized to take jurisdiction of and administer the bankrupt's property, such courts "must administer that property as they find it, and they have no power to create new rights in it for the benefit of either debtor or creditor." **In re Lindsay,** 12 Fed. Supp. 625, 630, states the rule in a similar manner.

This accords with the decision of the United States Supreme Court in the Radford case where the Kentucky law, which was part of the contract between the parties,

was adjudged to be the controlling factor.

It is certain that the Congress by the 1935 Frazier-Lemke Act has most emphatically not undertaken as its actual end and aim to provide for the liquidation of the estate of appellant or for the distribution of such estate to his creditors. On the contrary, the sole and only purpose of such statute is to take from appellee a part of his interest in mortgaged property and to give the same to appellant for purposes deemed by the Congress to be productive of the common good, in other words to regulate (for the purpose of promoting what was conceived to be the general good) the rights of appellant and appellees in the mortgaged properties, regardless of the fact that those rights have been and are established by the laws of the State of California.

Had the State of California undertaken to do that very thing, its power to do so might be sustained under the principles of the Blaisdell case as an exercise of the police power even though the exercise of such power involved the invasion of property rights and the taking of property without due process of law or the impairing of the obligation of the contract. But when the Congress attempts to exercise that power, under the guise of a delegated power to control the liquidation and administration of bankrupts estates, such attempt plainly meets the insurmountable bar of the Fifth and Tenth Amendments.

4. The Amended Frazier-Lemke Act Lacks the Universality and Uniformity of Application Required of National Legislation.

In order to be valid, an act of the Congress of the United States must be universal insofar as it reaches or touches the geography of the nation. Likewise, it must be uniform in its application to a given class.

Midwest Mutual Insurance Co. v. DeHoet, 22 N. W. 548 (Ia.), (Headnote 5);

Head Money Cases, 112 U. S. 580.

The amended Frazier-Lemke Act fails to meet these standards of universality and uniformity. Section 6 of the act undertakes to vest in each district court the power and duty to determine for itself when the emergency said by the Congress to have been created by the late economic depression is over "in a locality." If and when any court finds that such highly desired day has arrived, it may shorten the proceedings provided for in the act and proceed to liquidate the estate.

It thus appears that the whole intention of the act as it now exists is to leave the delay in each of the several districts to the energy with which the debtors in that locality may wail and the perseverance with which creditors in that locality may press their claims and to the interaction of such activities upon the conscience of the local district judge. The result may well be, and obviously was intended by the Congress to be, that the act might be in force in Southern California and not in force in Northern California, applicable in California and not applicable at all in Arizona, alive in Washington and dead in Oregon. There is no legal way under which, consistently with the principles announced in the above cited cases, the Congress can accomplish this highly bizarre result.

We anticipate, however, that appellant will advance the suggestion that the objectionable feature of the act just referred to may be cut away without affecting the act as a whole. It is, on the contrary, the contention of appellee that the invalidity of this portion of the act taints the entire statute. The Court must, of course, determine, if possible,

from the statute itself whether the Congress intended it to stand or fall as a whole; whether it was intended that the valid portions of the statute should be severable; or whether the statute was intended as a fully integrated unit.

Dorchy v. Kansas, 264 U. S. 286;

Butts v. The Merchants & M. Transportation Company, 230 U. S. 126.

The significant and, we believe, controlling consideration in this connection in the present instance is that the Congress has expressly and explicitly characterized **the entire statute** as an **emergency measure** by including therein the words:

> "This act is hereby declared to be an emergency measure."

If, then the entire act is an emergency measure, and if the Congress has been unable to limit the application and administration of the act to the emergency, can it be said that the Congress intended the act to be administered irrespective of the existence of the emergency and possibly for years after the entire termination thereof? The answer to this question appears to us to be an inescapable and unqualified negative. That being so, the entire act is so connected with and dependent upon the emergency, that the failure of the provisions limiting it to the emergency must necessarily involve the failure of the entire act.

IV.

CONCLUSION.

The judgment of dismissal herein should be affirmed as to appellee Shoemaker because:

(1) Irrespective of the constitutional question, this appellee is entitled to a judgment of dismissal because:

(a) The proceeding purportedly pending was not authorized by the statute;

(b) The proceeding could not be prosecuted in good faith; and

(c) No debtor creditor relation ever existed between appellant and this appellee;

(2) The statute purporting to support the proceedings is so violative of the Fifth and Tenth Amendments to the federal constitution as to be wholly void, it appearing in that behalf:

(a) That the constitutional question was raised and considered, a procedure not now open to attack because:

(i) Appellant joined in submitting the constitutional question to the lower court for decision without questioning the timeliness of such consideration; and

(ii) On the merits of the question as to the timeliness of such consideration, the court was fully justified in deciding the point;

(b) That the constitutional question was correctly decided because:

(i) The statute effects an actual taking of property rights of this appellee of a character condemned by the Supreme Court in the Radford case; and

(ii) Such taking cannot be justified under the principles established by the Blaisdell case with reference to exercise of police power by the states; and

(iii) The statute lacks the universality and uniform-

ity of application required for national legislation.

Respectfully submitted,

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No. 8092.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
WILLIAM DILLER,
Bankrupt.

William Diller,
Appellant,

vs.

Michael Shoemaker, John Hancock Mutual Life Insurance Company, a corporation, and California Trust Company, a corporation,
Appellees.

BRIEF OF APPELLEES JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND CALIFORNIA TRUST COMPANY.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

STATUTES.

TEXT BOOKS AND ENCYCOPEDIAS.

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BRIEF OF APPELLEES JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND CALIFORNIA TRUST COMPANY.

PRELIMINARY STATEMENT.

Since the condensed statement of facts set forth on pages 3 to 7 of the appellant's opening brief is in the main correct, we will not burden the Court with a further statement. However, during the course of our argument,

it will be necessary to amplify the appellant's statement in some particulars, which we will do by appropriate references to the Agreed Statement of Facts, set forth on pages 6 to 22 of the Transcript of Record.

We believe it fitting to identify the appellees upon whose behalf this brief is filed. At the time the proceedings were instituted, appellee John Hancock Mutual Life Insurance Company (hereinafter referred to as the "Hancock Company" or "appellee") was the owner and holder of an unpaid promissory note executed by appellant Diller, and was the beneficiary of a California trust deed upon real property in the city of Los Angeles, executed by the appellant to secure the payment of the promissory note. Appellee California Trust Company is a party solely because it was named as trustee under this trust deed, as such was legal owner of the real property subject to the encumbrance, and therefore was a necessary party to any proceeding restraining or allowing the enforcement of the beneficiary's rights under the trust deed. Appellee Michael Shoemaker, upon whose behalf a separate brief is being filed, was the owner of a promissory note and a trust deed to secure the same, which trust deed affected ranch property situated some fifty miles away from Los Angeles.

The statute involved in this appeal is Subsection (s) of Section 75 of the Bankruptcy Act, as amended by Act of Congress August 28, 1935, c. 792, Sec. 6, 49 Stat. 942 (Title 11 U. S. C. A., Sec. 203(s)), which subsection

is popularly referred to as the Frazier-Lemke Act, and hereafter when we mention the Frazier-Lemke Act we will refer to the one presently in force. There have been two Frazier-Lemke Acts. The first, enacted in 1934, was held unconstitutional by the Supreme Court in *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 79 L. Ed. 1593 (May, 1935). The present Act was passed by the Congress in August, 1935. Section 75 of the Bankruptcy Act is a new section originally enacted in 1933. Its purpose was to assist farmer debtors. Subsections (a) to (r) provide a method for a farmer to effect with his creditors a composition and an extension of time for the payment of his debts without being adjudicated a bankrupt. Subsection (s) provides for the adjudication of the farmer debtor as a bankrupt and grants him the property for a certain length of time, during which he has the right to retain the property and attempt to refinance it.

The appellant has presented his argument in two divisions: First, that the attack upon the constitutionality of the Frazier-Lemke Act is premature; second, that the Frazier-Lemke Act is constitutional. We will answer appellant's arguments in the same order, and will then present to the Court additional reasons for affirming the judgment of the District Court.

BRIEF SUMMARY OF THE ARGUMENT.

I. The District Court properly undertook to determine the constitutionality of Bankruptcy Act, Section 75(s) as amended.

A. The objection that the District Court prematurely considered the constitutionality of the Frazier-Lemke Act is not properly before this Court and therefore cannot be considered by it.

Baldwin v. United States, 72 Fed. (2d) 810 at 812 (C. C. A. 9th, 1934);

Holsman v. United States, 284 Fed. 193 at 198 (C. C. A. 9th, 1917);

Hathaway & Company v. United States, 249 U. S. 460, 63 L. Ed. 707 (1919);

Morrill v. Jones, 106 U. S. 466, 27 L. Ed. 267 (1883).

B. At the date of the hearing before the District Court appellees had already suffered injury by reason of the operation of the Frazier-Lemke Act, additional injury was threatened, and the necessary result of the Statute was to affect adversely existing property rights of appellees.

Pierce v. Society of Sisters, 268 U. S. 510, 69 L. Ed. 1070 (1925);

Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 71 L. Ed. 303 (1926);

Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255 (1923);

United States National Bank of Omaha v. Pamp, 83 Fed. (2d) 493 (C. C. A. 8th, May 11, 1936).

II. The present Frazier-Lemke Act is unconstitutional in that it violates Article I, Section 8, of the Constitution of the United States, and Articles V and X of the Amendments to the Constitution of the United States.

A. The Frazier-Lemke Act is an attempt by the Congress, acting under the guise of enacting a law upon the subject of bankruptcy, to regulate and change property rights established by state law.

United States v. Fox, 94 U. S. 315 at page 320, 24 L. Ed. 192 at page 193 (1877);

Watkins v. Lessee of Holman, 41 U. S. 25 at page 57 (16 Pet. 25 at page 57), 10 L. Ed. 873 at page 886 (1842);

Langdon v. Sherwood, 124 U. S. 74 at page 81, 31 L. Ed. 344 at page 345 (1888);

In re Young, 12 Fed. Supp. 30 (D. C. Ill., 1935);

In re Sherman, 12 Fed. Supp. 297 (D. C. Va., 1935);

United States v. Butler, 297 U. S. 1, 80 L. Ed. Adv. Op. 287 (1936);

McCulloch v. Maryland, 4 Wheat. 316 at 423, 4 L. Ed. 579 at 605 (1819);

Bailey v. Drexel Furniture Company, 259 U. S. 20, 66 L. Ed. 817 (1922);

United States v. Constantine, ... U. S. ....., 80 L. Ed. Adv. Op. 195 (1935);

In re Lowmon, 79 Fed. (2d) 887 (C. C. A. 7th, 1935).

B. The Frazier-Lemke Act is an attempt by the Congress to take property without due process of law.

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. Ed. 1593 (May, 1935);

In re Sherman, 12 Fed. Supp. 297 (D. C. Va. 1935);

In re Young, 12 Fed. Supp. 30 (D. C. Ill., 1935).

C. The Frazier-Lemke Act is an attempt by the Congress to exercise the police powers which are reserved to the states.

Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413 (1934);

Gibbons v. Ogden, 9 Wheat. 1 at 203, 6 L. Ed. 23 (1824);

United States v. Butler, 297 U. S. 1, 80 L. Ed. Adv. Op. 287 (1936);

Carter v. Carter Coal Co., ... U. S. ....., 80 L. Ed. Adv. Op. 749 (1936);

In re Slaughter, 13 Fed. Supp. 893 (D. C. Tex., 1936).

D. The Frazier-Lemke Act is not a uniform law on the subject of bankruptcies.

Washington v. Pratt, 8 Wheat. 681, 5 L. Ed. 714 (1823);

In re Slaughter, 12 Fed. Supp. 206 (D. C. Tex., 1935).

III. Irrespective of the constitutionality of the Frazier-Lemke Act, under the facts of the case at bar, the judgment of the District Court should be affirmed.

A. The Frazier-Lemke Act is inapplicable to the situation presented by the facts of the case at bar.

Montgomery v. Gilbert, 77 Fed. (2d) 39 (C. C. A. 9th, 1935);

McCloskey v. Pacific Coast Co., 160 Fed. 794 (C. C. A. 9th, 1908);

Mosley v. Manhattan Oil Co., 52 Fed. (2d) 364 (C. C. A. 8th, 1931) (certiorari denied, 284 U. S. 677, 76 L. Ed. 572, 1931).

B. Appellant had no *bona fide* hope of eventual rehabilitation, and therefore his petition for relief under the Frazier-Lemke Act was not filed in good faith.

In re Borgelt, 79 Fed. (2d) 929 (C. C. A. 7th, 1935);

In re Byrd, 15 Fed. Supp. 453 (D. C. Md., 1936);

In re Slaughter, 13 Fed. Supp. 893 (D. C. Tex., 1936).

ARGUMENT.

I.

The District Court Properly Undertook to Determine the Constitutionality of Bankruptcy Act, Section 75(s), as Amended.

It is only because the appellant has devoted a substantial portion of his brief (App. Op. Br. pp. 10 to 16) to raising and arguing the point that the District Court considered the constitutionality of the Frazier-Lemke Act prematurely that we deem it necessary to meet such issue. We believe and propose to show that the appellant's argument is erroneous upon two grounds: First, procedural; and, second, substantive.

A. The Objection That the District Court Prematurely Considered the Constitutionality of the Frazier-Lemke Act Is Not Properly Before This Court and Therefore Cannot Be Considered by It.

The procedural reason is that appellant did not present this "premature" argument to the District Court; it was not assigned as error and, accordingly, is raised for the first time in appellant's brief.

The agreed statement of the case [Tr. pp. 6 to 22] does not state that this argument was made to the District Court, and error was not assigned upon this ground [Tr. pp. 38 and 39]. Furthermore, appellant's brief carefully avoids directly charging that the District Court committed error in considering the constitutionality of the statute; also, it is to be noted that in the Court below the appellant joined in the argument upon the constitutionality of the Act and contended that the Act was valid. Accord-

ingly, the raising of the issue on appeal is a clear violation of the rules of this Court (Rules 11 and 24, C. C. A. 9) and of this Court's uniform decisions that *errors argued in the brief but not assigned as error will not be considered.*

See *Baldwin v. United States,* 72 Fed. (2d) 810 at 812 (C. C. A. 9th, 1934), where this Court said:

> "many alleged errors are argued in the briefs which were not assigned as error. This court has repeatedly held that errors argued in the briefs but not assigned as error will not be considered."

Holsman v. United States, 248 Fed. 193 at 198 (C. C. A. 9th, 1917):

> "Counsel for appellants have discussed in their briefs . . . certain matters respecting which it is claimed that error was committed by the court, but we have searched in vain among the assignments of error filed on the appeal for any assignments respecting these matters. For this reason, such alleged errors cannot be insisted upon here, and this court is therefore not called upon to look into them."

The rule is, of course, the same in the Supreme Court of the United States.

See *Hathaway & Company v. United States,* 249 U. S. 460, 63 L. Ed. 707 (1919).

Morrill v. Jones, 106 U. S. 466, 27 L. Ed. 267 (1883), where the Court held:

> "It is a sufficient answer to this objection that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on the trial and incorporated in some form into the record, an authenticated transcript of which is returned with our writ of error."

B. At the Date of the Hearing Before the District Court Appellees Had Already Suffered Injury by Reason of the Operation of the Frazier-Lemke Act, Additional Injury Was Threatened, and the Necessary Result of the Statute Was to Affect Adversely Existing Property Rights of Appellees.

The substantive reason why appellant's argument is wrong is that the transcript shows that at the hearing before the District Court there was presented to the Court a definite showing of injury already suffered by the appellees as a proximate result of the Frazier-Lemke Act, and also that additional injury to the appellees' existing property rights was immediately threatened. The appellees were not seeking to have the trial court render an abstract decision on constitutional law. They were seeking relief from a statute, the operation of which had already injured them.

But what *does* the record show was the picture presented to the District Court in November, 1935? Very briefly, it was as follows:

The appellant occupied a large house in an exclusive residential district in the city of Los Angeles; this house was subject to an encumbrance in the principal amount of $20,000.00, held by appellee; appellant had paid no interest upon the debt since July, 1932, which was more than three years before the hearing; appellant had paid no taxes upon the property since 1931, appellee had advanced taxes for three years, and one year's taxes were delinquent; the total debt was $27,434.06 [Tr. pp. 10 and 11]. Since September, 1934, appellant had effectively prevented appellee from collecting any of the in-

debtedness by a resort to successive proceedings under Section 75 of the Bankruptcy Act, having twice failed to effect a composition and extension with his numerous creditors [Tr. pp. 6 and 9], and having twice been adjudicated a bankrupt under the successive Frazier-Lemke Acts [Tr. pp. 6 and 9]. In his compromise offer of September 18, 1935, the debtor had offered to pay appellee for the property only $21,610.00, which was the value of the property fixed by appraisers appointed by the Court, which sum was approximately $6,000.00 less than the amount of the debt [Tr. pp. 6 to 17]. It is not surprising that appellee refused this offer.

With such a picture of a property with an appraised value much less than the encumbrance, of a property daily *decreasing* in value, of a debt daily *increasing,* of many years' taxes unpaid by the debtor, of three years' interest unpaid, of litigation covering more than a year, during which the creditor was subjected to delay and consequent further loss because it was enjoined by the statute from enforcing its rights, could the District Court have denied that at the time of the hearing this appellee had already suffered very substantial injury to its property rights, and that additional injury was threatened as the necessary result of the operation of the Frazier-Lemke Act? For it was the necessary result of the Frazier-Lemke Act, since all proceedings by a creditor are specifically stayed by Subsections (o) and (p) of the same Section 75 of the Bankruptcy Act.

Appellant at this point argues (App. Op. Br. pp. 11 and 12) that at the time of the hearing there was nothing to prevent appellee from proceeding to enforce the security, but this statement entirely overlooks the specific injunction

against so proceeding contained in Subsections (o) and (p), which injunctions in terms include *all* proceedings under Section 75. The appellant also disregards the fact that he made strenuous effort before this Court to obtain an order restraining the sale without the posting of a supersedeas bond. However, if the appellant's position is correct, this appeal is moot and should be dismissed, for the record of the proceedings before this Court shows that upon the failure of the appellant to post the supersedeas bond as ordered by the Court, appellees proceeded to sell the property in accordance with the provisions of the trust deed, and the appellant no longer owns the property.

The appellant also attempts to argue that the property had not been appraised (App. Op. Br. p. 12), but this also overlooks the fact that only two months before the hearing the appellant, in his proposal for composition, had offered to buy the property for a sum which had been fixed as its value by appraisers appointed in the proceeding [Tr. p. 17], and at the hearing it was admitted that appraisers appointed in the proceedings had so valued the property [Tr. p. 20].

It is unreasonable to assume that the property's value had changed in two months, or even that there would have been an entirely new appraisal—the appellant would have allowed the appraisal figure to stand.

From the authorities cited by the appellant to support his contention of premature consideration, he attempts, on page 12, to state a "well-established doctrine of law" as

controlling. But such authorities do not establish such a strict rule. Rather, they are in complete accord with the general rule that a party may not request the courts to declare an act unconstitutional unless he can show that he has sustained or is threatened with the present danger of sustaining injury as a result of the present operation of the statute, but that he need not postpone his request for relief until *all* the requirements prescribed for effecting such injury have been carried out.

The courts have frequently decided constitutionality of statutes when injury had not been sustained but was threatened and would necessarily follow the enforcement of the statute.

In *Pierce v. Society of Sisters,* 268 U. S. 510; 69 L. Ed. 1070 (1925), the Supreme Court held a school law unconstitutional although the act was not to take effect for a period of two years after the attack was made upon it. The Court specifically held that the suit was not premature.

In *Village of Euclid v. Ambler Realty Co., 272* U. S. 365, 71 L. Ed. 303 (1926), the constitutionality of a zoning ordinance was under consideration. The defendant argued that the constitutional attack was premature because the plaintiff had made no effort to secure a building permit. The Court held that the action was not prematurely brought, since the very existence of the ordinance constituted a "present invasion of appellee's property rights and a threat to continue it".

And, again, *Terrace v. Thompson,* 263 U. S. 197, 68 L. Ed. 255 (1923), was an action involving the alien land law of the state of Washington. The defendant contended that the plaintiff should have postponed his constitutional argument until he had made a lease and lost his property through the enforcement of the land law. The Court held that the action was not premature, and said, in language surprisingly applicable to the case at bar:

> "The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes and the Constitution protects the essential attributes of property."

The authorities cited by the appellant actually afford him slight comfort and assistance when examined:

The case of *In re Bennett,* 13 Fed. Supp. 353 (D. C. Mo., 1936), quotations from which appear on pages 39 to 43 of appellant's brief, we submit is not now the law, since the Circuit Court of Appeals for the Eighth Circuit thereafter held the Frazier-Lemke Act unconstitutional in *United States National Bank of Omaha v. Pamp,* 83 Fed. (2d) 493 (C. C. A. 8th, May, 1936).

In *Dallas Joint Stock Land Bank v. Davis,* 83 Fed. (2d) 322 (C. C. A. 5th, 1936), cited on pages 13 and 14 of appellant's brief, the Court affirmed the denial of a motion to dismiss proceedings under the Frazier-Lemke Act. But it is essential to note that such denial was affirmed specifically *without prejudice* to the renewal of the motion if the appellant was later deprived of property rights. The

Court rightly refused to hand down a declaratory opinion. The Court admits that:

> "if the necessary result of the act is to take away appellant's substantial rights in its security, it need not wait until all the forms prescribed for that taking away have been gone through with, but may sue at once to save itself."

In *United States National Bank of Omaha v. Pamp,* 77 Fed. (2d) 9 (C. C. A. 8th, 1935), cited on page 15 of appellant's brief, the opinion discloses that the farmer debtor had not even filed a petition for relief under the Frazier-Lemke Act, but was still proceeding under the (a) to (r) subsections of Section 75. The plaintiff, who was seeking to foreclose, made the specious argument that the Frazier-Lemke Act was unconstitutional, and therefore the rest of Section 75 was also unconstitutional, which argument naturally did not appeal to the Court. The portion of the opinion quoted in the appellant's brief was a mere gratuitous pronouncement by the court, and further along in the opinion the court specifically refrains from expressing any opinion on the constitutionality of the Frazier-Lemke Act. It is pertinent to note that one year later, in a case involving the same parties, after the farmer debtor had filed his petition under the present Frazier-Lemke Act, the same Court did not hesitate to condemn said Act as unconstitutional in *United States National Bank of Omaha v. Pamp,* 83 Fed. (2d) 493 (C. C. A. 8th, May 11, 1936).

II.

The Present Frazier-Lemke Act Is Unconstitutional in That it Violates Article I, Section 8, of the Constitution of the United States, and Articles V and X of the Amendments to the Constitution of the United States.

The portion of the appellant's brief dealing with the constitutionality of the amended Act commences with an admonition to the Court to allow a so-called presumption of constitutionality to operate, and thus conveniently sidestep the necessity of deciding the constitutionality of the statute. Then follow exhausting analyses of the two Frazier-Lemke Acts, and of the *Radford* decision; an attempt to justify a federal taking of property by using principles applicable solely to the exercise of the state police power; and, in conclusion, there is presented an appealing picture of the Congress, faced with the sweeping condemnation of the original Frazier-Lemke Act set forth in the *Radford* decision, again striving to accomplish exactly the same results in a constitutional manner.

It occurs to us that in the presentation of our argument that the Act is unconstitutional, it will tend to clarity and will assist the Court if we discuss the provisions of the Constitution pertinent to the Act being considered, and in the course of such discussion answer the appellant's argument at appropriate points.

A word, however, with respect to the argument of the presumption of constitutionality. The argument is simply this: The Congress thought the Act was constitutional, therefore it must be, and the courts must so hold. The argument thus presented is a good example of attempting

to lift one's self by one's bootstraps. To be sure, it is to be presumed that the Congress will not consciously enact an unconstitutional statute, for to do so would be a clear breach of its duty to the nation. But it is another matter thereafter to insist that the courts, in construing such statute, be governed by this opinion, for this would be depriving the courts of the right and duty granted and imposed upon them by the Constitution to be the sole arbiter of the validity of the laws passed by the Congress. Carried to its logical conclusion, the argument would force the courts to hold all laws constitutional without question, and our governmental system of keeping separate the powers to make and to construe laws would disintegrate.

But fortunately such is not the case, and the books are filled with solemn warnings to the courts jealously to guard the citizens' rights against stealthy and unlawful encroachments by the Legislature. It is, of course, appropriate for the courts to examine legislative debates when construing an ambiguous statute, but the purpose of such examination is to ascertain the purpose and true meaning of the statute—not to discover the opinion of the lawmakers upon the validity of the act and be guided by it. In fact, this latter attitude would cast aspersions upon the integrity of the legislator, for it is his duty to pass only those laws which he believes valid. Indeed, a study of the debates cited by appellant indicates that there was a doubt as to the power of Congress to enact such a law, and this doubt is epitomized by Senator McCarran's remark, quoted on page 47 of the appellant's brief, "*if* any bill can be enacted which will be constitutional it will be a bill along these particular lines". (Italics ours.) After

all, was the constitutionality of this Act the paramount consideration, as argued on page 46 of appellant's brief? Was not the main consideration, rather, the desire to assist farmers? Paragraph 6 of the Act itself specifically declares it is an emergency measure.

A. The Frazier-Lemke Act Is an Attempt by the Congress, Acting Under the Guise of Enacting a Law Upon the Subject of Bankruptcy, to Regulate and Change Property Rights Established by State Law.

Article I, Section 8, of the Constitution grants to the Federal Congress the power to establish "uniform laws on the subject of bankruptcies throughout the several states". However, during the life of the nation bankruptcy laws have been in effect for only about one-third of the time (1 *Remington on Bankruptcy,* 4th ed., pp. 14 to 17), and this fact will be referred to hereafter in our argument.

It has long been established that the laws of the state in which real property is situated exclusively govern the manner and mode of its transfer.

In *United States v. Fox,* 94 U. S. 315 at page 320, 24 L. Ed. 192 at page 193 (1877), the Court said:

> "The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the state."

In *Watkins v. Lessee of Holman,* 41 U. S. 25 at page 57 (16 Pet. 25 at page 57), 10 L. Ed. 873 at page 886 (1842), it is said:

> "And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated."

And in *Langdon v. Sherwood,* 124 U. S. 74 at page 81, 31 L. Ed. 344 at page 345 (1888), it is said:

> "The question of the mode of transferring real estate is one peculiarly within the jurisdiction of the legislative power of the state in which the land lies."

Accordingly, the manner of incumbering land as security for a debt and the manner of enforcing said security rest exclusively upon the laws of the state in which the land is located, and it follows that the Federal Government has no power to regulate or change the manner or mode of enforcing such security.

As the transcript sets forth, the Hancock Company, at the time the appellant instituted his proceedings, was the owner and holder of a promissory note secured by a trust deed upon real property of the debtor. This trust deed was in the customary California form [Tr. p. 11], with which the Court is undoubtedly familiar. Under the California law applicable to this trust deed, which, as above indicated, governs the manner of transferring interests in real property lying in the state, the beneficiary of a trust deed, upon default of the debtor, has, among others, the following rights:

Immediately to institute proceedings resulting in a sale of the security, which sale can be held at least within

four months (California Civil Code, Section 2924); to have an absolute sale with no period of redemption; to have such sale a private one, as distinguished from a public judicial sale, as upon execution; to obtain immediate possession of the property at the date of the sale; and to obtain a deficiency judgment against the debtor if the security does not sell for the amount of the debt. All of these rights are valuable property rights granted by California law.

The next question is: Has the holder of the trust deed the same rights under the Frazier-Lemke Act? The answer is, he has not; and the Congress, in enacting the Statute, has attempted to allow the Federal Government to regulate property rights established by the states.

That these substantial property rights have been taken away from the appellee is evident. The appellant admits (App. Op. Br. pp. 24 and 25) that the Act takes away the right to decide when the sale shall be held, and that this right will be held in abeyance for *three* years while the debtor tries to refinance himself. In California this right is even stronger than the similar right held to have been taken in the *Radford* case, for in California the creditor is not subject to the discretion of the Court in having his sale. Appellant also admits the impairment of the right to control the property during the period of default, and to receive the rents and profits during such period. This is a serious matter, for there is the constant danger of waste, depreciation and disrepair, with additional loss to the creditor, as pointed out in the *Radford* case, in spite of the fact that there is no assurance, and there can be none, that the debtor will be able to extricate himself from his position at the end of the three-year

period granted. In answer to this the debtor might argue that the Statute requires him to pay rent. However, the rent is not payable for one year, and it is not certain whether the rent will ever be paid, since no security is required to insure such payment. If the debtor is unable to refinance his obligation the holder of the encumbrance will finally obtain the property, probably in a wasted condition.

The right to have the sale absolute and to obtain immediate possession with no period of redemption was not discussed in the *Radford* case, but in this respect again the Frazier-Lemke Act changes the rights and grants a period of redemption where none before existed (paragraph 3 of Subsection (s)). This addition is also important, for we believe the court can take judicial notice of the widespread preference of California investors for trust deeds rather than mortgages, for the redemption period granted the mortgagor, and during which he retains possession, offers him ample opportunity to milk the property. This additional creation of a redemption period is well discussed in *In re Young,* 12 Fed. Supp. 30 (D. C. Ill., 1935), and in *In re Sherman,* 12 Fed. Supp. 297 (D. C. Va., 1935), and it was also mentioned in the opinion of the District Judge in the case at bar.

The right to have a private sale, which is taken away by the requirement of a public judicial sale, set forth in paragraph 3 of Subsection (s), may not seem particularly important, but this also adds to the burdens already resting upon the creditor. It is well known that practically all trust deed sales are privately conducted by the trustee, with no court proceedings with the attendant delays and added expense involved.

From the above discussion it is apparent that the Act has done far more than only grant the debtor a breathing space, as appellant argues on page 23. In fact, it has vitally changed, impaired and denied rights granted by the state law, and has thus regulated the internal affairs of the state. But under what constitutional grant of authority is it contended that this is justified? Simply under the catch-all of the "broad bankruptcy powers" granted to the Congress by Article I, Section 8 of the Constitution.

However, it is clear from a study of the Frazier-Lemke Act and a comparison of the prior sections of the Bankruptcy Act of 1898, that Subsection (s) is not in fact bankruptcy legislation, although it is conveniently added to the Bankruptcy Act. The intent, purpose and result of the Bankruptcy Act as it stood prior to the enactment of Section 75 was to provide a simple and equitable method to liquidate the estate of the debtor and to distribute such estate to his creditors, all the while recognizing the rights established by state laws. The Frazier-Lemke Act does not operate in this manner. Rather, instead of distributing the estate to the creditors it takes from the creditor a large part of his interest in the estate and give such interest to the debtor and, in addition, actually gives the debtor more rights than he had before, or had bargained for, under state law.

Since this is the necessary operation of the Act, it must have been the true intent of the Congress, in enacting it, thus to alter and regulate the rights established by the

states. Therefore, this Act is not bankruptcy legislation, but is a regulation by the Federal Government of state contract rights under the guise of bankruptcy legislation. The Congress has no power to do this. A comparison of the original Frazier-Lemke Act and the present one discloses that the underlying purpose of both acts was, as said in the *Radford* case, and the words are equally applicable to the present Act, "to preserve to the mortgagor the ownership and enjoyment of the farm property" and "to take from the mortgagee rights in the specific property held as security". The difference, if any, between the two acts is one of degree only, and not of substance.

Fortunately, however, the courts have been watchful to strike down legislative attempts to accomplish prohibited ends under the pretext of exercising powers which were granted. Thus, in *United States v. Butler,* 297 U. S. 1, 80 L. Ed. Adv. Op. 287 (1936), the Court held invalid an act of Congress which attempted to regulate crop production in the several states under the guise of exercising the Federal taxing power. The Court said:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of an assertion of powers which are granted."

And in *McCulloch v. Maryland,* 4 Wheat. 316 at 423, 4 L. Ed. 579 at 605 (1819), Chief Justice Marshall said:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of exe-

> cuting its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

See, also, for purported exercise of the taxing power held invalid:

> *Bailey v. Drexel Furniture Company,* 259 U. S. 20, 66 L. Ed. 817 (1922) (the child labor tax case);
>
> *United States v. Constantine,* ..... U. S. ....., 80 L. Ed. Adv. Op. 195 (1935).

It is significant that the Court in the above cases prohibited the use by the Congress of its undoubted, essential and sovereign taxing powers when such use was merely a subterfuge to accomplish ends not within the Federal power to effect. If the exercising of the taxing power is so closely scrutinized, the more closely should the exercise of the bankruptcy power be examined to discover invalid acts passed in its name, for the bankruptcy power is of far less importance to the nation than the taxing power and, as pointed out above, bankruptcy laws have been in effect for only one-third of our national life.

In *In re Lowmon,* 79 Fed. (2d) 887 (C. C. A. 7th, 1935), the Court said:

> "Where property rights are regulated by the state law, Congress has no right under the bankruptcy power to alter those rights."

We submit that the Frazier-Lemke Act is an attempt to use the bankruptcy power to regulate matters solely within the power reserved to the states, and is therefore invalid.

B. The Frazier-Lemke Act Is an Attempt by the Congress to Take Property Without Due Process of Law.

But the necessary result of this abortive attempt to use the bankruptcy power, as set forth in the next preceding portion of our argument, has been simply to run afoul of the fifth constitutional amendment, which prohibits the taking of property without due process. The bankruptcy power is subject to the terms of the Fifth Amendment, as pointed out by Brandeis, J., in the *Radford* case, at page 602 (295 U. S.) and at page 1611 (79 L. Ed.):

> "For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken, even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

We have indicated in the preceding portion of this brief some of the property rights which are thus invalidly taken by the operation of the Statute. The description of that taking could be amplified at length, and additional property rights taken from the appellee by the Act could be enumerated. Almost all of the decisions which have been handed down upon the present Frazier-Lemke Act list the five property rights of the Kentucky mortgagee which the *Radford* case held had been invalidly taken away by the former Act, and so we will not burden the

Court by a repetition of the list. However, it is not to be assumed that that list was intended as an exclusive one and that there could not be other rights which were taken invalidly. The *Radford* list was only an enumeration of the five Kentucky property rights of which the mortgagee was wrongfully deprived, and it was unnecessary to list more lost rights. Even though the present act cured these now-famous five defects, this would be no assurance that the Act would be constitutional, for other states would have granted different rights which might be impaired by the Act. In fact, we have enumerated additional California property rights of which the appellee is deprived. And these additional rights are of equal importance. The draughtsmen of the present Act patently overlooked the fact that the *Radford* case was dealing only with rights established by Kentucky law. As is said in *In re Sherman*, 12 Fed. Supp. 297 (D. C. Va., 1935), in discussing the *Radford* list:

> "I do not understand that the opinion purports to name all of the property rights affected or to say that those enumerated are the only ones affected. Presumably, it named those to which its attention was most forcibly drawn."

See, also, *In re Young*, 12 Fed. Supp. 30 (D. C. Ill., 1935), wherein additional property rights are enumerated.

Even the appellant *concedes* that the present Act does not cure two of the defects of the former law, but then he makes the amazing argument that now, since only two of appellee's property rights are adversely affected, instead of the five listed before, this Court should hold the present Act unobjectionable. We do not understand that the Fifth Amendment operates in this way, nor

can we discover that the *Radford* case attempted to evaluate the relative importance of the rights taken. It would appear that if the act deprives appellee of only one of its property rights the act must fall. The Court's concern is not *how many* rights are taken wrongfully, but, rather, its inquiry is and must be directed to determine *if any* rights are so taken. We have demonstrated that the present Act has taken away many of appellee's rights; that such taking was without due process, and therefore we submit that the Act must be held invalid as a violation of the Fifth Amendment.

C. The Frazier-Lemke Act Is an Attempt by the Congress to Exercise the Police Powers Which Are Reserved to the States.

In 1934 the Supreme Court held the Minnesota mortgage moratorium law constitutional in *Home Building & Loan Association v. Blaisdell,* 290 U. S. 398, 78 L. Ed. 413 (1934). The Minnesota statute granted a moratorium on foreclosures for a period of not more than two years, upon certain conditions designed to protect the mortgagee in the interim. Many of the states, including California, have enacted similar moratory legislation in the past few years. However, at the outset of this part of our discussion, we desire to emphasize the fact that the Court upheld this statute squarely upon the ground that it was a proper exercise of the police powers reserved to the several states by the Tenth Amendment.

What these police powers are is difficult to define. Chief Justice Marshall described them as "that immense mass of legislation which embraces everything within the territory of a state not surrendered to the Federal Govern-

ment", (*Gibbons v. Ogden,* 9 Wheat. 1, at 203, 6 L. Ed. 23 (1824).)

However, these powers include the right of the states to alter or impair the property rights of their citizens, even the rights to enforce security liens upon land, provided that such alteration or impairment promotes the best interests of the state and its citizens, that is, if it is for the general welfare, and it is established that this alteration of rights by the states does not violate the Fourteenth Amendment.

It has long been established, however, that the Federal Government does not have such police powers, for under our governmental system of delegated power the Federal Government's powers are strictly enumerated by the Constitution, and those not granted are reserved to the states, and this reservation is protected by the Tenth Amendment. The states have not surrendered their police powers.

See:

United States v. Butler, supra;

Carter v. Carter Coal Co., ... U. S. ....., 80 L. Ed. Adv. Op. 749 (1936).

In spite of this great distinction between the exercise of the reserved police powers by the state and the attempted exercise of those same powers by the Congress, the appellant argues that, since the state of Minnesota could enact moratorium legislation under its police powers, in spite of the Fourteenth Amendment, therefore the Congress can also enact such laws under its bankruptcy

powers, in spite of the Fifth Amendment. And, further, that the *Blaisdell* case is the yardstick for the Court to use to determine whether the Federal impairment is reasonable. The appellant even asks us to assume that the power to enact mortgage moratorium legislation exists in both state and national legislatures (App. Op. Br. p. 27). Such assumption and argument are fallacious, because they ignore the great and fundamental difference between the exercise of reserved powers and the attempted exercise of powers not granted. The one case is the exercise of power which one admittedly has; and the other is the attempted exercise of power which one specifically has not. Nor can we agree that Mr. Justice Brandeis missed this fundamental distinction between the Minnesota moratorium statute and the Frazier-Lemke Act.

In *In re Slaughter,* 13 Fed. Supp. 893 (D. C. Tex., 1936), a case especially interesting, as hereafter shown, the Court said:

> "Definitely the national government has no moratorium granting power. The authority of the state of Minnesota to stay proceedings, as sustained in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, was never intended to indicate that the national government had any such power."

It is patent that, in determining the constitutionality of the Frazier-Lemke Act, this Court must not rely upon the *Blaisdell* yardstick, although the appellant, the Congress and the learned District Judge in *In re Reichert,*

13 Fed. Supp. 1 (D. C. Ky., 1936), wrongly did so, but, rather, the yardstick this Court must use is: What powers does the Constitution grant to the Congress?

D. The Frazier-Lemke Act Is Not a Uniform Law on the Subject of Bankruptcies.

Lastly, we come to the argument that, even if the Congress had the power to enact a statute accomplishing the results intended by the Frazier-Lemke Act, still the present Act would be unconstitutional, because it is not a *uniform* law on the subject of bankruptcies *throughout* the several states. We refer to paragraph 6 of Subsection (s), which states that the Act is an emergency measure, and if in the Court's judgment the emergency has ceased to exist in its locality, the stay may be shortened.

Especially in view of the fact that laws affecting property rights must be construed strictly (*Washington v. Pratt,* 8 Wheat. 681, 5 L. Ed. 714 (1823),) the Frazier-Lemke Act does not present a law having that geographical uniformity which is recognized as requisite before a statute can be valid. Paragraph 6 of Subsection (s) expressly allows the Court in each of the many Federal Judicial Districts throughout the country to determine the cessation of the emergency. The stay granted to the debtor is not dependent upon the continuance of the national emergency, but, rather, upon its continuance in the particular locality in which the Court sits. The free exercise of this power by the courts would produce unusual results so obvious as to make it unnecessary to list them. The paragraph

lists no criteria to assist the courts in determining when the emergency is at an end. The provision, contrary to the Constitution and our governmental theory, thus delegates legislative power to the judiciary. Even one of the decisions which decided with express doubt that the Frazier-Lemke Act is constitutional also held that this paragraph 6 is clearly unconstitutional.

> *In re Slaughter,* 12 Fed. Supp. 206 (D. C. Tex., 1935).

If it is argued that this paragraph is severable from the rest of the Act, such argument is met by the strict construction rule just discussed. It is met further by an examination of the entire Subsection (s), which discloses clearly the intent to enact a law in a time of stress, and the provision in paragraph 6 that "this act is hereby declared to be an emergency measure" is merely a frank admission of this fact. Further, if this paragraph 6 is severed from the preceding ones the result is that a stay for a fixed three-year period is granted, and one of the grounds upon which the Court in the *Radford* case distinguished the *Blaisdell* case was that the stay granted by the first Frazier-Lemke Act was inflexible.

During the course of this division of our argument we have not burdened the Court with extensive citation or quotations from the decisions which have held the present Subsection (s) unconstitutional. Numerically, the decisions holding the Act void are twice the number of those

upholding it. Naturally, we consider these opinions are more carefully written and present the correct view of the law and, for the convenience of the Court, we list them here with no further comment, except respectfully to suggest that the decisions in the *Pamp* and *Sherman* cases merit particular attention:

United States National Bank of Omaha v. Pamp, 83 Fed. (2d) 493 (C. C. A. 8th, 1936);

In re Lowmon, 79 Fed. (2d) 887 (C. C. A. 7th, 1935);

In re Young, 12 Fed. Supp. 30 (D. C. Ill., 1935);

In re Sherman, 12 Fed. Supp. 297 (D. C. Va., 1935);

In re Lindsay, 12 Fed. Supp. 625 (D. C. Iowa, 1935);

In re Schoenleber, 13 Fed. Supp. 375 (D. C. Neb., 1936);

In re Davis, 13 Fed. Supp. 221 (D. C. N. Y., 1936);

In re Diggle (Commerce Clearing House Bankruptcy Service, New Matters, paragraph 3951) (D. C. Kan., 1936);

In re Tschoepe, 13 Fed. Supp. 371 (D. C. Tex., 1936);

In re Wogstad, 14 Fed. Supp. 72 (D. C. Wyo., 1936);

In re Mullikin (Commerce Clearing House Bankruptcy Service, New Matters, paragraph 4000) (D. C. Ind., 1936);

In re Maynard (Commerce Clearing House Bankruptcy Service, New Matters, paragraph 4184) (D. C. Idaho, 1936).

III.

Irrespective of the Constitutionality of the Frazier-Lemke Act, Under the Facts of the Case at Bar the Judgment of the District Court Should Be Affirmed.

A. The Frazier-Lemke Act Is Inapplicable to the Situation Presented by the Facts of the Case at Bar.

It is a principle of appellate jurisprudence that the court of appeal may affirm the judgment of the lower court although the grounds upon which the affirmance is based are different than those upon which the trial court made its ruling. This Court has recently restated and applied the proposition in *Montgomery v. Gilbert,* 77 Fed. (2d) 39 (C. C. A. 9th, 1935):

> "it is well settled that an affirmance need not be based on the same grounds as those which influenced the trial court."

This proposition is true even though the theory of the trial court was erroneous. *McCloskey v. Pacific Coast Co.,* 160 Fed. 794 (C. C. A. 9th, 1908).

There is also the rule that grounds presented to the trial court but not passed upon by it may properly be urged in the appellate court in support of the judgment. *Mosley v. Manhattan Oil Co.,* 52 Fed. (2d) 364 (C. C. A. 8th, 1931) (Certiorari denied, 284 U. S. 677, 76 L. Ed. 572, 1931.)

With these two principles before us we respectfully submit that even if the trial court had not desired to rule upon the constitutionality of the statute, or even if

the Court was of the opinion that the Act is constitutional, still under the facts and issues presented in this case the same judgment of dismissal would have been entered, and accordingly this Court should affirm the judgment.

It is to be recalled that one of the grounds urged by this appellee was that the appellant's city residence property, which was fifty miles away from the ranch property, was not incident to or necessary for the debtor's farming operations, that such city property did not properly fall within the terms and provisions of Section 75; and in other words that Section 75 was inapplicable. [Tr. p. 18.] It is also to be recalled that at the hearing before the District Court evidence was offered and received, and argument had, upon all of the issues raised, but that the Court thereafter elected to decide the cause solely upon the issue of constitutionality. [Tr. p. 20.]

In order to have before this Court all proper grounds of affirmance, we again present the argument that the Frazier-Lemke Act is not applicable to the property upon which this appellee had its encumbrance.

In the first place, the property in the city is fifty miles away from the ranch property. It is not reasonable to suppose that the framers of the Act intended it to operate in this "city house" and "country farm" situation, or to allow a debtor to lump together all of his property, urban as well as rural, and obtain relief with respect to all of it. Rather, it was the intent of the Act to assist, if constitutionally possible, the true farmer—one who lives upon and farms his land. If the other construction is placed upon the act it would logically lead to bizarre results. For example, suppose A owns a house in the city of Los Angeles which is encumbered by a trust deed. A lives

in this house the year around, and Los Angeles is his home. However, he owns farm property in Kansas and directs the farming by mail or has an efficient manager. If the holder of the trust deed on the Los Angeles house commenced sale proceedings under the trust deed, it would be a very forced construction of the Frazier-Lemke Act to allow A, by pleading he had a farm two thousand miles away, to prevent his creditor from enforcing the debt upon the security, namely, the Los Angeles house. Or again, suppose A has a farm and lives on it. In a large city several thousand miles away he owns a house which he inherited, but which is subject to a trust deed. To allow A to lump his farm and city property together under the Act when foreclosure threatened the city house, and thus save the city property, would cause an unjust result and would be a very forced construction of the Act. But in the present case the appellant is asking this Court to place just such a strained and illogical construction upon the Act when he insists that his city property, his residence, be lumped together with his alleged farming property many miles away.

Also, other provisions of the Act indicate that it is inapplicable to the present case. Paragraph 2 of Subsection (s) provides for the payment of rental which is not to commence for one year, and that the rental shall be based upon the rental value, net income and earning capacity of the property. These provisions cannot really be applied to city residence property occupied by the debtor and wholly unattached from the farm property. The city residence has no net income or earning capacity, and rent is customarily paid monthly, not annually.

B. Appellee Had No Bona Fide Hope of Eventual Rehabilitation, and Therefore His Petition for Relief Under the Frazier-Lemke Act Was Not Filed in Good Faith.

Another ground upon which this appellee based its argument in the trial court was that appellant in filing his petition for relief actually had no bona fide hope of ability to eventually rehabilitate himself, regardless of the length of the stay granted him, and that therefore the petition was not filed in good faith. [Tr. p. 19.]

At the date of the hearing below the appellant owed this appellee $27,000.00, although the property had been appraised in the proceedings as being reasonably worth only $21,000.00. The appellant had offered to pay appellee only this appraised figure. [Tr. pp. 16 and 17.] With these figures before it, it must be apparent to the Court that the appellant had no hope of eventual rehabilitation, and in fact had no desire to pay off the encumbrance eventually. At that time the debt was $6,000.00 more than the appraised value; at the end of a three-year stay under Subsection (s) the property would have *decreased* in value, whereas the debt would have *increased*. It would not be to the debtor's economic advantage to pay off the debt.

Further, there was offered no assurance that the rental would be paid, that taxes would be paid (and at that time one full year's taxes were delinquent and another year's payable, though not delinquent), and that the property would be kept in good condition and repair, for no security

for all of these necessary payments is required by the Act. We do not believe that it can be insisted that such a showing assured the Court that the appellant honestly desired an opportunity to pay his debts. If the petition for relief was not filed in good faith, and if no showing of probable ability to pay the debts eventually was made, then the petition must be dismissed, for otherwise this will be an imposition upon the Court, for the Court will be lending its powerful assistance to enable an unworthy debtor further to harass the creditor. We do not understand that the chancellor will lend his support to such an inequitable scheme.

Decisions holding that the petition under the Frazier-Lemke Act must be filed in good faith and with the probable hope of debt payment have been rendered.

In *In re Borgelt,* 79 Fed. (2d) 929 (C. C. A. 7th, 1935), the facts were surprisingly similar to the case at bar, for there also the property was valued at less than the encumbrance upon it and the farmer debtor offered to pay less than the amount of the debt. Upon such a showing the trial court dismissed an order restraining a foreclosure sale by the creditor, and upon appeal this dismissal was affirmed. The court said:

> "That subsection (s) presupposes a probability of eventual debt liquidation. It further presupposes a prior good faith effort on the part of the debtor to propose or accept a plan which is reasonably calculated to effect a debt liquidation. Here there was

no *bona fide* plan presented by the debtors, and the conciliator after a hearing reported that fact to the court. The evidence was overwhelming that there was not only no reasonable probability of an eventual debt liquidation, but there was no possibility of that result, and the debtors were not assured that they could procure a loan of sufficient amount to carry out their so-called plan."

A similar picture was presented to the Court in *In re Byrd,* 15 Fed. Supp. 453 (D. C. Md., 1936,) and there the Court dismissed the Frazier-Lemke Act proceedings, saying:

"But any reasonable interpretation of this subsection must presuppose a probability of the debtor's eventual liquidation of his debts. This in effect means that it is not sufficient for the petitioner merely to institute the proceedings with the wild hope that he will be able to have accepted, by the requisite number and amount of creditors, a plan for liquidation of his debts, but the hope must itself be founded upon reason, which means that there must be some probability of eventually liquidating his debts in conformity with the plan. In short, the act is not to be construed as affording protection to every petitioner who invokes its provisions without having substantially more to recommend him to the court for relief than his bare status as a farmer and his need of assistance."

And lastly, *In re Slaughter,* 13 Fed. Supp. 893 (D. C. Tex., 1936) enunciates the same rule, and the Court ordered the property sold for the creditor. This decision is especially significant, for it will be noted that the same Court and the same Judge in a prior hearing in the same case held, reluctantly, that the Frazier-Lemke Act was constitutional (*In re Slaughter,* 12 Fed. Supp. 206 (D. C. Tex., 1935)), and the appellant in the case at bar cites this decision in support of the constitutionality of the Act (App. Op. Br. p. 30). The later opinion recedes somewhat from the former position as to the validity of the Act, but irrespective of the constitutional question the Court in effect dismissed the proceedings upon the ground that there was no reasonable hope of eventual rehabilitation, saying:

> "It is repellant to the conscience of the chancellor that a debtor situated in so favorable a position should be permitted to hold off his creditor without any substantial evidence of hope of compliance with his obligation."

We respectfully submit that regardless of the question of constitutionality, under the facts of the case at bar and in accordance with the principle enunciated by the decisions herein discussed, this Court should affirm the District Court's judgment of dismissal.

CONCLUSION.

The judgment of dismissal heretofore entered by the District Court should be affirmed as to appellees John Hancock Mutual Life Insurance Company and California Trust Company for the reasons that:

1. The constitutionality of the Frazier-Lemke Act was a question properly to be considered by the District Court, since

(a) When the argument was made appellees had actually suffered injury which was the proximate result of the Frazier-Lemke Act, and additional injury was threatened to their existing property rights by the Act;

(b) The issue of constitutionality was submitted to the District Court by all parties;

(c) The argument that the lower court's action was premature was not presented to said court, and such action was not assigned as error. Accordingly, by the rules and decisions of this Court, such question is not properly before this Court.

2. The Frazier-Lemke Act is unconstitutional in that it violates the Constitution and amendments to the Constitution of the United States, since

(a) It is a Federal attempt to alter, control and impair property rights established by the laws of the several states and the attempted justification of such action under the bankruptcy powers of Congress;

(b) It deprives the appellees of property rights without due process;

(c) It is a Federal exercise of the police powers which are expressly reserved to the several states;

(d) It does not possess the uniformity requisite to a Federal statute.

3. Irrespective of the constitutionality of the Statute, the judgment should be affirmed as to these appellees because the facts of the case at bar disclose that

(a) The Frazier-Lemke Act does not and was not intended to apply to the situation existing between appellant and appellees;

(b) The petition for relief was not filed in good faith, since the petitioner did not have the requisite hope, desire or possibility of eventual payment of his obligation to appellee.

Respectfully submitted,

JOHN L. ROWLAND,
621 South Spring Street,
Los Angeles, California,
Solicitor for Appellees John Hancock Mutual Life Insurance Company and California Trust Company.

BAUER, MACDONALD, SCHULTHEIS & PETTIT,
621 South Spring Street,
Los Angeles, California,
Of Counsel.

No. 8115

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index

Index Page

Index

Index Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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MR. J. C. GARLINGTON,
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MR. L. C. MYERS,
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Attorneys for Appellee and Plaintiff. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 1622.

CLIFFORD GILBERT, by and through his guardian ad litem, James D. Gilbert,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

BE IT REMEMBERED, that on April 23rd, 1934, the Complaint was filed herein, in the words and figures following, to wit: [2]

[Title of Court and Cause.]

COMPLAINT AT LAW.

Comes now the above named plaintiff and for a first count and cause of action against the above named defendant complains and alleges as follows, to-wit:

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in interstate commerce, owning, operating, and con-

trolling a main line of railway for the carriage of such passengers and freight for hire from the City of Chicago in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of Powell and near the City of Deer Lodge, in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed, by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and [3] said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in interstate commerce, to-wit: he was on said day employed in driving an automobile gasoline motor dump truck, used for hauling materials, supplies, equipment, and debris resulting from a fire upon the premises of said defendant in Deer Lodge,

Montana, which said fire happened upon said premises on or about 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile motor dump truck herein mentioned and was engaged in hauling materials, supplies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge Montana, as herein set out, and during all of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to [4] the date aforesaid, carelessly and negligently failed to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned,

with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished him was old, worn, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that:

(a) The oil or gear pump had become badly worn, as to the plates or body of metal enclosing it, to such an extent as to permit the oil to escape by and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially [5] when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof would raise to a certain level and remain there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the truck to the release valve of the lifting cylinders was old and worn and the ratchets holding the lever control in an open or closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, and sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of

pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such [6] a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of metal flanges or blades approximately ⅜ of an inch thick, 3½ inches wide, and 8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystallized, were cracked, warped, bent, and broken; numerous pieces having been broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cool-

ing of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and which said fan belt caused the said fan to revolve in the effort necessary to provide a circulation of air for the purpose of cooling the engine of said motor truck.

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of [7] water, as herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine; that as a result of said vibrations and jerking of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, became broken and had to be repeatedly replaced.

(m) That the ignition system of said motor truck was loose, insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that said motor truck could not be cranked nor started without being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, and dump body, as aforesaid, and for a long period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, [8] dump body, engine, valves, pistons, and fan, as hereinbefore alleged, and said defendant had notice and knowledge of said defects, as aforesaid, and the unsafe and dangerous condition of the truck, dump body, engine, valves, and fan, or in the exercise of ordinary care and

caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and to have put the truck dump body, engine, ignition and cooling systems, and fan in a reasonably safe condition for use by plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant negligently failed and neglected to make any repairs whatever to said truck, engine, ignition and cooling systems, and fan while in its service, and the same were continued in service in such unsafe and dangerous condition aforesaid for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to provide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies, and debris resulting from a fire which had destroyed certain parts of the premises of the said defendant, was compelled to stop said motor dump truck at a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said

premises, which said point was approximately one [9] hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed in said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said motor dump truck as a result had become greatly overheated, was jerking and vibrating to such a marked degree that it was impossible for plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the unsafe and dangerous condition created by the defects aforesaid, and believing the said motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump

truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine, particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or [10] pet cock or cup for the purpose of adjusting the flow of gasoline through said priming cock or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while said plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several pieces, causing said several pieces of the flanges or blades of said fan ⅜ of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and

against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and useless to this plaintiff in his regular employment. [11]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, hardworking young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humiliation, and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Mon-

tana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin and the amount involved in this action at law is more than the sum of Three Thousand Dollars, to wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [12]

Comes now the above named plaintiff and for a second count and cause of action against the above named defendant complains and alleges as follows, to-wit:

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in interstate commerce, owning, operating, and controlling a main line of railway for the carriage of such passengers and freight for hire from the City of Chicago in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of

Powell and near the City of Deer Lodge in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed, by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in interstate commerce, to wit: he was on said day employed in driving an automobile gasoline motor dump truck, used for hauling materials, supplies, equipment, and [13] debris resulting from a fire upon the premises of said defendant in Deer Lodge, Montana, which said fire happened upon said premises on or about the 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile motor dump truck herein mentioned and was engaged in hauling materials, sup-

plies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge, Montana, as herein set out, and during all of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned: that defendant on and prior to the date aforesaid, carelessly and negligently failed to inspect and to examine the condition of and to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned, with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished by defendant to him was not inspected and was old, worn, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that:

(a) The oil or gear pump had become badly worn, as to [14] the plates or body of metal enclos-

ing it, to such an extent as to permit the oil to escape by and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof would raise to a certain

level and remain there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the truck to the release valve of the lifting cylinders was old and worn, and the ratchets holding the lever control in an open or [15] closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective

in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of mental flanges or blades approximately ⅜ of an inch thick, 3½ inches wide, and 8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystallized, were cracked, warped, [16] bent, and broken; numerous pieces having been broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cooling of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and

which said fan belt caused the said fan to revolve in the effort necessary to provide a circulation of air for the purpose of cooling the engine of said motor truck.

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of water, as herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine; that as a result of said vibrations and jerkings of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, became broken and had to be repeatedly replaced.

(m) That the ignition system of said motor truck was loose, [17] insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that

said motor truck could not be cranked nor started without being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, dump body, and cooling and ignition systems as aforesaid, and for a like period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, dump body, engine, valves, pistons, fan, and ignition and cooling systems, as hereinbefore alleged, and the unsafe and dangerous condition of the truck, dump body, engine, and fan, or in the exercise of ordinary care and caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and

to have put the truck dump body, engine, ignition and cooling systems, and fan in a reasonably safe condition for use by plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant carelessly and negligently failed and neglected to inspect or to [18] examine the condition of, or to make any examination of, or any repairs whatever to said truck, engine, ignition and cooling systems, and fan, while in its service, and the same were continued in service in such unsafe and dangerous condition because of the failure of the said defendant to examine or to inspect said truck, engine, ignition and cooling systems, valves, pistons, and fan, as it was the duty of the said defendant then and there to do as aforesaid, for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to inspect and to examine the condition of and to provide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies and debris resulting from a fire which had destroyed certain parts of the premises

of the said defendant, was compelled to stop said motor dump truck at a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said premises, which said point was approximately one hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed by said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said [19] motor dump truck as a result had become greatly overheated, was jerking and vibrating to such a marked degree that it was impossible for plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the

unsafe and dangerous condition created by the defects aforesaid, and believing the said motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine, particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or pet cock or cup for the purpose of adjusting the flow of gasoline through said priming cock or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several [20] pieces, causing said several pieces of the flanges or blades of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately

seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and useless to this plaintiff in his regular employment. [21]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, hard working young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had

earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humiliation and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Montana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin and the amount involved in this action at law is more than the sum of Three Thousand Dollars, to-wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [22]

Comes now the above named plaintiff and for a third count and cause of action against the above named defendant complains and alleges as follows, to-wit:

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in intrastate commerce, owning, operating, and controlling a main line of railway for the carriage of such passengers and freight for hire, from the City of Chicago in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of Powell and near the City of Deer Lodge, in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed, by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in intra-state commerce, to-wit: He was on said day employed in driving an automobile gasoline motor dump truck, used for hauling materials, supplies, equipment, [23] and debris resulting from a fire upon the premises of said defendant in Deer Lodge, Montana, which said fire happened upon said premises on or about the 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile dump truck herein mentioned and was engaged in hauling materials, supplies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge, Montana, as herein set out, and during all of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and

upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to the date aforesaid, carelessly and negligently failed to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned, with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished him was old, worn, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that:

(a) The oil or gear pump had become badly worn, as to the plates or body of metal enclosing it, to such an extent as to [24] permit the oil to escape by and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss

of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof would raise to a certain level and remain there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the truck to the release valve of the lifting cylinders was old and worn and the ratchets holding the lever control in an open or closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too [25] long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, and sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of metal flanges or blades approximately 3/8 of an inch thick, 3½ inches wide, and

8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystallized, were cracked, warped, bent, and broken; numerous pieces having been [26] broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cooling of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and which said fan belt caused the said fan to revolve in the effort necessary to provide a circulation of air for the purpose of cooling the engine of said motor truck.

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of water, as

herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine, as herein alleged; that as a result of said vibrations and jerking of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, became broken and had to be repeatedly replaced. [27]

(m) That the ignition system of said motor truck was loose, insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that said motor truck could not be cranked nor started without being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933, the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, valves, pistons, ignition and cooling systems, and dump body, as aforesaid, and for a long period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck, dump body, fan, valves, pistons, ignition and cooling systems, as hereinbefore alleged, and said defendant had notice and knowledge of said defects, as aforesaid, and the unsafe and dangerous condition of the truck, dump body, valves, pistons, fan, and ignition and cooling systems, or in the exercise of ordinary care and caution should have known thereof, for more than two days prior to October 30, 1933, the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and to have put the truck, dump body, engine, valves, pistons, fan, and ignition and cooling systems in a reasonably safe condition for use by [28] plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant negligently failed and neglected to make any repairs whatever to said truck, engine, valves, pistons, fan, and ignition and cooling systems while in its service, and the same were continued in service in such unsafe and dangerous condition aforesaid for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to pro-

vide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock, A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies, and debris resulting from a fire which had destroyed certain parts of the premises of the said defendant, was compelled to stop said motor dump truck at a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said premises, which said point was approximately one hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed in said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said motor dump truck as a result had become greatly overheated, was jerking

and vibrating to such a marked degree that it was impossible for [29] plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the unsafe and dangerous condition created by the defects aforesaid, and believing the said motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine; particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or cup or pet cock or cup for the purpose of adjusting the flow of gasoline through

said priming cock or cup or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while said plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several pieces, causing said several pieces of the flanges or blades [30] of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and

useless to this plaintiff in his regular employment. [31]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, *hardwork* young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humiliation, and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Montana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin, and the amount involved in this action

at law is more than the sum of Three Thousand Dollars, to-wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [32]

Comes now the above named plaintiff and for a fourth count and cause of action against the above named defendant complains and alleges as follows, to-wit:—

I.

That at all times hereinafter mentioned the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, a common carrier of freight and passengers for hire, engaged in intra-state commerce, owning, operating, and controlling a main line of railway for the carriage of such passengers and freight for hire from the City of Chicago, in Illinois, through the States of Illinois, Wisconsin, Minnesota, North and South Dakota, Montana, Idaho, and Washington to the Puget Sound, and particularly through the County of Powell and near the City of Deer Lodge in said county, both in Montana.

II.

That on the 18th day of April, A. D. 1934, James D. Gilbert was by the above entitled court appointed,

by order duly given and made, guardian ad litem of Clifford Gilbert, his minor child, and that said minor child is of the age of twenty years. That ever since said 18th day of April, 1934, the said James D. Gilbert was and at the date of the commencement of this action still is the guardian ad litem of Clifford Gilbert, a minor, and said order of appointment has never been revoked nor annulled and the same is at the date of the commencement of this action in full force and effect.

III.

That on the 30th day of October, A. D. 1933, and several days prior thereto, the plaintiff was a servant of the defendant and employed by the defendant in intra-state commerce, to-wit: he was on said day employed in driving an automobile gasoline [33] motor dump truck, used for hauling materials, supplies, equipment, and debris resulting *for* a fire upon the premises of said defendant in Deer Lodge, Montana, which said fire happened upon said premises on or about the 21st day of October, 1933; that at all times herein mentioned, and as such servant and employee of the defendant company, the plaintiff, Clifford Gilbert, in his regular employment by said company, was engaged in driving said automobile motor dump truck herein mentioned and was engaged in hauling materials, supplies, equipment, and debris, which said debris had resulted from the fire upon the premises of the said defendant in Deer Lodge, Montana, as herein set out, and during all

of said times plaintiff was working for said defendant company and doing work within the course and scope of his employment as such driver, servant, and employee of the defendant.

IV.

That plaintiff within the scope and course of his employment as a servant and employee of the defendant company was engaged in driving said motor dump truck and with others was engaged in removing the debris from said premises at and near and upon the premises of the said defendant company and at a point upon the main line where the repair shops and round house of the said defendant company were located, which said debris had accumulated upon the premises of said defendant company herein described from fire hereinbefore mentioned; that defendant on and prior to the date aforesaid, carelessly and negligently failed to inspect and to examine the condition of and to provide and furnish this plaintiff, as its employee and servant engaged in the work herein mentioned, with a safe and suitable truck with which to do the work he was then and there engaged in, in that the said truck so furnished by defendant was not inspected and was worn, old, defective, dangerous, and unsafe in its then condition for use by plaintiff or anyone else, in that: [34]

(a) The oil or gear pump had become badly worn, as to the plates or body of metal enclosing it, to such an extent as to permit the oil to escape by

and through its connections instead of holding and increasing the pressure beneath the pistons as the pump operated.

(b) That the oil was insufficient in quantity to supply volume sufficient under the pistons to raise the dump body to the height required to dump the load, and to the maximum height for which the said dump body was constructed for the purpose of dumping the load.

(c) That the packing of the pistons was not tight or close enough for the use intended, namely, to prevent oil escaping outside the cylinders in which the pistons operated, thereby occasioning loss of oil and loss of pressure, and leaving the quantity remaining insufficient to raise the pistons, and thereby the dump body to the height required to dump the load or to the maximum height for which the dump body was constructed, for the purpose of dumping the load.

(d) That the shaft rotating the oil or gear pump was out of alignment, warped, and bent as to the "spline," thereby preventing the application of full force to the turning of the oil or gear pump.

(e) That the clutch mechanism by which power from the engine was conveyed to and caused the "spline" in its shaft to turn was so worn as to be not positive in action, especially when put in position by the operator for the purpose of lifting the dump body to dump the load, and the dump body by reason thereof could raise to certain level and re-

main there and could not be raised any higher by the use of the engine, and thereby the oil pressure would become reduced and the truck body would fall back upon the truck chassis.

(f) That the rod leading from a lever in the cab of the [35] truck to the release valve of the lifting cylinders was old and worn, and the rachets holding the lever control in an open or closed position had become worn and smooth from wear, and the bolts in said lever control were too small in diameter and too long, and as a result failed to hold the rod and the release valve in a fixed position under either condition of open or closed valve.

(g) That the oil placed in the cylinders in the gear pump and lifting apparatus of the dump body was too heavy, thick, sluggish for the purpose for which it was used and was not of the quality and weight for the work for which it was intended to be used and for which it was used.

(h) That the release valve was defective in that it would not fully close, but remained practically open at all times, thereby preventing a full application or force of fluid oil pressure when in hoisting operation, especially when the highest degree of pumping force was applied to raise the pistons connected to the dump body, the oil being thereby and by reason of the release valve being partially opened permitted to escape by the valve back into the reservoir.

(i) That the fan used as a part of the cooling system of said motor truck was worn and defective

in that the axle upon which said fan revolved and the bearings upon which said fan ran upon said axle, together with the surface collars thereon and the threads of the pressure nut upon the end of said axle were in such a wornout condition that the said fan, which normally would have had while running no play nor wobble from a plane perpendicular to said axle, ran with a wobble at the periphery thereof of 10° to 15°, more or less or thereabouts, from the said perpendicular plane.

(j) That the construction of said fan is such that a series of metal flanges or blades approximately ⅜ of an inch thick, 3½ [36] inches wide, and 8 inches long extend out over the surface of said fan for a distance of approximately 4 or 5 inches; that the said flanges or blades had become crystalized, were cracked, warped, bent, and broken; numerous pieces having been broken out of said flanges or blades prior to the said 30th day of October, 1933.

(k) That the said fan and the bearings and axle upon which the said fan revolved were so worn that when driven at a rapid rate of speed and at a speed sufficiently rapid to provide air for the cooling of the engine of said motor truck, the said fan would jump out of its normal position for a distance of some one-quarter to one-half an inch up and down and to each side, and with such force and such rapidity as to repeatedly break the heavy fan belt, which said fan belt connected the said fan with the engine of said motor truck, and which said fan belt caused the said fan to revolve in the effort necessary

to provide a circulation of air for the purpose of cooling the engine of said motor truck .

(l) That the radiator of said motor truck was defective and damaged to such an extent as to permit the water placed in said radiator for the purpose of cooling the engine of said motor truck to leak and run out so rapidly as to make it necessary to fill said radiator from one to one and a half times each four hours that said truck was in use or operation; that the leaky and damaged condition of said radiator resulting in the loss of water, as herein alleged, caused the engine of said motor truck to overly heat and the said engine, while in such overly heated condition, would cause the cylinders and spark plugs of the engine of said motor truck to miss or to fail to discharge in sequence, which said failure of said pistons and spark plugs of said motor truck to discharge resulted in a violent vibration or jerking of the said engine; that as a result of said vibrations and jerking of said engine, as herein alleged, the fan belt by which the fan used as a part of the cooling system of said motor truck was driven, [37] became broken and had to be repeatedly replaced.

(m) That the ignition system of said motor truck was loose, insufficient, in need of repair, and defective to such an extent that the cylinders and spark plugs of said motor truck would not ignite, discharge, nor hit to such an extent that said motor truck could not be cranked nor started without

being pushed or dragged for a distance of some one to two blocks, it being necessary upon numerous occasions to drag or to push the said motor truck in order to start the machinery of said motor truck.

(n) That the engine of said motor truck was in bad condition, being choked and clogged with carbon, the valves being unseated and badly in need of grinding, which said condition of said engine caused the said engine to overly heat and to fail to discharge in regular sequence, and to run upon two or three cylinders, resulting in violent vibrations, shaking, and jerking of said engine.

That for more than two days prior to October 30, 1933. the defendant knew, or in the exercise of reasonable care and caution should have known, of the unsafe and dangerous condition of said truck, fan, dump body, valves, pistons, and ignition and cooling systems as aforesaid, and for a like period of time knew, or in the exercise of ordinary care and caution should have known, of all of the defects in said truck. dump body, engine, valves, pistons, fan, and ignition and cooling systems, as hereinbefore alleged, and the unsafe and dangerous condition of the truck, dump body, engine, fan, ignition and cooling systems, or in the exercise of ordinary care and caution should have known thereof, for more than two days prior to October 30, 1933. the same being a sufficient and reasonable length of time for defendant to have made repairs to the defective parts therein, and to have put the truck, dump body, engine, ignition and cooling [38] systems, and fan

in a reasonably safe condition for use by plaintiff and his fellow workmen, or to have taken the said truck out of service; but the defendant carelessly and negligently failed and neglected to inspect or to examine the condition of, or to make any examination of, or any repairs whatever to said truck, engine, ignition and cooling systems, and fan, while in its service, and the same were continued in service in such unsafe and dangerous condition because of the failure of the said defendant to examine or to inspect said truck, engine, ignition and cooling systems, valves, pistons, and fan, as it was the duty of the said defendant then and there to do as aforesaid, for more than two days prior to the date plaintiff received his injuries, all in utter disregard of its duty to inspect and to examine the condition of and to provide plaintiff with safe and suitable machinery, appliances, and equipment with which to do his work.

V.

That on or about October 30, 1933, between the hours of ten and eleven o'clock A. M., the plaintiff, while driving said motor dump truck as an employee of said defendant, and within the scope of his employment as such driver of said motor dump truck, and pursuant to his duties incident to driving said motor dump truck and hauling materials, supplies, and debris resulting from a fire which had destroyed certain parts of the premises of said defendant, was compelled to stop said motor dump truck at

a point upon the premises of the defendant herein named, and particularly at a point between the north wall of the frame buildings of said defendant and the track running north of said premises, which said point was approximately one hundred fifty feet away from the location of the work shops of the said defendant which had been destroyed by said fire and the debris of which was being hauled by this plaintiff as herein alleged; that the plaintiff [39] at all times using ordinary care for his own safety was compelled to stop said motor dump truck because of the fact that the engine of said motor dump truck was discharging or hitting upon three cylinders; that said engine of said motor dump truck as a result had become greatly overheated, was jerking and vibrating to such a marked degree that it was impossible for plaintiff to continue to drive said truck in the course of his employment and for the purposes herein set out; that plaintiff at all times using ordinary care for his own safety raised the hood which covered the engine of the said motor dump truck for the purpose of examining said engine and of determining, if possible, what was wrong with said engine and what was causing it to violently jerk, vibrate, and fail to hit or run upon all its cylinders, then and there not knowing of the dangerous and unsafe condition of said truck ignition and cooling systems and fan and other appliances therein and thereto and he being unwarned by defendant of the unsafe and dangerous condition created by the defects aforesaid, and believing the said

motor dump truck to be in good condition and a safe appliance with which to do the work which he had been ordered to do by said defendant with said motor dump truck, reached toward the rear left side of the cylinder head of said engine of said motor dump truck for the purpose of adjusting a priming cock or cup, which said priming cock or cup was and is placed upon said engine for the purpose of regulating the flow of gasoline and accelerating the flow of gasoline into the said engine, particularly the ignition system of said engine; that while adjusting said priming cock or cup, this plaintiff placed his fingers and thumb upon the handle of said priming cock or pet cock or cup for the purpose of adjusting the flow of gasoline through said priming cock or pet cock or cup; and to cause said engine to run smoothly and regularly upon all its cylinders; that while plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, the fan upon the engine of [40] said motor dump truck became jammed or obstructed and because of the defective condition herein alleged suddenly and violently, and without warning, exploded, burst, and became disintegrated into several pieces, causing said several pieces of the flanges or blades of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and ad-

justing said priming cock or cup or pet cock; that one of the said pieces of the fan blade or flange, approximately three inches wide, four inches long, and three-eighths of an inch thick, having been broken off a blade or flange of said fan, was violently thrown and propelled on and against the knuckles and fingers of said plaintiff's right hand, completely severing the third or ring finger of said plaintiff's right hand and crushing and bruising the knuckles and fingers of plaintiff's right hand, especially the fourth or little finger, causing said fourth or little finger to become permanently crippled and disabled, and leaving said fourth or little finger stiff and useless to this plaintiff in his regular employment. [41]

VI.

That at the time of the injury and immediately before the same, the plaintiff was a man of unusual bodily activity and strength, an athlete, and also well trained as a skilled mechanic; that he was a sober, industrious, hard working young man, always employed, and giving satisfaction to his employers, of good common school education; that he was only twenty years old and with an expectancy of life of more than 40 years; that his habits were regular; that while he was earning only $5.35 per day at this temporary work, he was capable of earning and had earned more, to-wit: $6.00 and $7.00 per day as a skilled mechanic. That the said injuries have caused and will cause him great pain of mind and body, permanent total incapacity to earn money as a skilled mechanic, life long disfigurement, humili-

ation, and despondency to his damage in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00).

VII.

That the plaintiff is a citizen of the State of Montana, having been born in the State of Montana, being a citizen of the United States, and having resided in Montana since the date of his birth, with an intention of making the State of Montana his home and residence permanently.

VIII.

That the defendant is a citizen of the State of Wisconsin and the amount involved in this action at law is more than the sum of Three Thousand Dollars, to-wit: it is the sum of TWENTY-FIVE THOUSAND DOLLARS.

WHEREFORE, Plaintiff prays judgment against the defendant in the sum of TWENTY FIVE THOUSAND DOLLARS ($25,000.00), together with costs of suit. [42]

WHEREFORE, PLAINTIFF, Clifford Gilbert, prays for only one judgment against the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, in the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00), and for his costs herein expended, and for such other and further relief as to the Court may seem meet and proper in the premises.

W. L. EMERSON
T. J. DAVIS
Attorneys for Plaintiff,
Clifford Gilbert. [43]

District of Montana,
County of Silver Bow—ss.

JAMES D. GILBERT, being first duly sworn, on his oath deposes and says:

That he is the duly appointed, qualified, and acting guardian ad litem of Clifford Gilbert, the plaintiff in the above-entitled action, and makes this verification as such guardian ad litem; that he has read the above and foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge.

JAMES D. GILBERT

Subscribed and sworn to before me this 20th day of April A. D. 1934.

[Notarial Seal] THOMAS J. DAVIS
Notary Public for the State of Montana. Residing at Butte, Montana. My commission expires Oct. 8, 1934.

[Endorsed]: Filed April 23, 1934. C. R. Garlow, Clerk. [44]

Thereafter, on May 10, 1934, Demurrer to Complaint was filed herein, in the words and figures following, to wit: [45]

[Title of Court and Cause.]

DEMURRER

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff filed therein, upon the grounds and for the reasons:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

The defendant demurs particularly to that portion of the plaintiff's complaint set out as a first cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

III.

The defendant demurs particularly to that portion of [46] the plaintiff's complaint set out as a second count and cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

IV.

The defendant demurs particularly to that portion of the plaintiff's complaint set out as a third count and cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

V.

The defendant demurs particularly to that portion of the plaintiff's complaint set out as a fourth count and cause of action, upon the ground and for the reason that the same does not state facts suffi-

cient to constitute a cause of action against the defendant.

R. F. GAINES
Butte, Montana,
MURPHY & WHITLOCK
Missoula, Montana,
Attorneys for Defendant.

Service of the foregoing Demurrer accepted and receipt of copy acknowledged, this 10th day of May, 1934.

W. L. EMERSON
T. J. DAVIS
Attorneys for Plaintiff.

[Endorsed]: Filed May 10, 1934. C. R. Garlow, Clerk. [47]

Thereafter, on July 21st, 1934, Order Overruling Demurrer was entered herein, in the words and figures following, to wit:

[Title of Court and Cause.]

The within demurrer coming on regularly to be heard and having been submitted without argument or briefs, and the court having considered the said demurrer, and being duly advised, and good cause appearing therefor, it is hereby overruled, with 20 days to answer, according to request and stipulation, upon receipt of notice hereof.

Dated July 21, 1934.

CHARLES N. PRAY,
Judge. [48]

Thereafter, on July 30, 1934, ANSWER, as amended, was duly filed herein, in the words and figures following, to wit: [49]

[Title of Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and for answer to the complaint of the plaintiff filed therein admits, denies and alleges:

Answering plaintiff's first count:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line of railroad extending from Chicago, Illinois to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line or railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said first count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at [50] or near the City of Deer Lodge. Denies all other allegations of Paragraph 3.

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this connection the defendant alleges that the truck which the plaintiff was driving at said time belonged to the City of Deer Lodge, Montana, and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own neg-

ligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter. [51]

VI.

Defendant denies each, every and all allegations of Paragraph 6.

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. Denies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of first count of the plaintiff's complaint, not hereinbefore specifically admitted or denied.

Answering plaintiff's second count or cause of action:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line or railroad extending from Chicago, Illinois to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line of railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said second count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at or near the City of Deer Lodge. Denies all other allegations of Paragraph 3. [52]

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this connection the defendant alleges that the truck which the plaintiff was driving at said time belonged to the City of Deer Lodge, Montana and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of the said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with

the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own negligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter.

VI.

Defendant denies each, every and all allegations of Paragraph 6. [53]

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. Denies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of second count of plaintiff's complaint, not hereinbefore specifically admitted or denied.

Answering plaintiff's third count or cause of action:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line of railroad extending from Chicago, Illinois

to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line of railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said third count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at or near the City of Deer Lodge. Denies all other allegations of Paragraph 3.

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred [54] to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this connection the defendant alleges that the truck which the plaintiff was driving at said time belonged to the City of Deer Lodge, Montana and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said

truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of the said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own negligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter.

VI.

Defendant denies each, every and all allegations of Paragraph 6.

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. De- [55] nies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of third count of plaintiff's complaint, not hereinbefore specifically admitted or denied.

Answering plaintiff's fourth count or cause of action:

I.

Admits that at the times referred to defendant was and now is a Wisconsin corporation operating a line of railroad extending from Chicago, Illinois to Puget Sound through the intervening states including Montana, and engaged in both interstate and intrastate commerce. Admits that said line of railroad passes through Powell County, Montana.

II.

Denies each, every and all allegations of Paragraph 2 of said fourth count.

III.

Admits that on or about the date alleged, plaintiff herein was employed by the defendant to drive a certain motor truck, which was being used in and about the work of cleaning up following a fire which had occurred at the defendant's shops at or near the City of Deer Lodge. Denies all other allegations of Paragraph 3.

IV.

Admits that plaintiff's work was driving a truck, which was used in cleaning up debris resulting from fire referred to in the last paragraph. Denies each, every and all other allegations of Paragraph 4. Denies in particular that the defendant was negligent in any particular alleged or at all. In this [56] connection the defendant alleges that the truck which the plaintiff was driving at said time

belonged to the City of Deer Lodge, Montana and not to this defendant.

V.

Defendant admits that on or about the date alleged the plaintiff opened the hood of the said truck which he was driving, and of his own volition and without the knowledge or direction of the defendant, proceeded to tinker with the mechanism of the engine of the said truck. In this connection, the defendant alleges that the plaintiff had for many months prior thereto driven said truck as an employee of the City of Deer Lodge, Montana, the owner of said truck, and was entirely familiar with the method of operating the same. The defendant denies each, every and all other allegations of Paragraph 5, and while defendant admits that plaintiff at said time and place sustained some injury to certain of his fingers, the defendant denies that the same resulted in the manner or from the causes alleged by the plaintiff, and on the contrary, alleges that the same resulted from the plaintiff's own negligence in carelessly bringing his hand into contact with the fan or some moving part upon said truck, as more fully alleged hereinafter.

VI.

Defendant denies each, every and all allegations of Paragraph 6.

VII.

Admits that the plaintiff is a resident of the State of Montana and that the defendant is a Wisconsin corporation. Denies all other allegations of Paragraph 7 and 8.

VIII.

Denies each, every and all other allegations of fourth [57] count of plaintiff's complaint, not hereinbefore specifically admitted or denied.

FOR A FURTHER ANSWER AND FIRST SEPARATE DEFENSE TO THE PLAINTIFF'S COMPLAINT AND TO EACH AND ALL OF THE ALLEGED COUNTS AND CAUSES OF ACTION THEREIN CONTAINED, THE DEFENDANT ALLEGES:

I.

That it is and at all times referred to in plaintiff's complaint was a Wisconsin corporation, the owner of and engaged in operating a line of railroad extending from Chicago, Illinois to Puget Sound in the State of Washington, and passing through the intervening states, including Montana, which line of railroad was and is used in the transportation of persons and property. That in connection with its said railroad, the defendant maintained and still maintains certain shops at Deer Lodge, Powell County, Montana. That in the fall of 1933 a fire occurred which burned certain property at the said shops and it became necessary to clean up certain debris resulting therefrom.

II.

That in and about the said work there was used a certain Mack truck, which was furnished and provided by the City of Deer Lodge, Montana, and

which was owned by said municipality. That the plaintiff herein who was an experienced truck driver and who had for many months prior thereto driven said truck so furnished by the City of Deer Lodge was employed by the defendant as the driver of said truck. That the said plaintiff while operating said truck negligently and carelessly and while assuming to make some examination of and about the motor of said truck, sustained injury to certain of his fingers. That at said time and at all [58] times while plaintiff was operating said truck, he well knew and understood the construction, mechanism and condition of the same and well knew and understood the method of operating the same and had had long experience in driving, and operating of the particular truck in question and well knew and understood the nature and character of the work he was doing and each and all of the circumstances and conditions surrounding his work and the operation of said truck at said time and place, and that he knew and appreciated all of the risks and dangers arising or likely to arise in the course of his work and in and about the operation of said truck. That each and all of said surrounding circumstances and conditions and the dangers and risks incident to said work were open and obvious to him and should have been known and appreciated by him as a reasonable person. And this defendant alleges that such injury as he sustained at said time resulted from causes, the risk of injury from which he assumed.

FOR A FURTHER ANSWER AND SECOND SEPARATE DEFENSE TO THE PLAINTIFF'S COMPLAINT AND TO EACH AND ALL OF THE ALLEGED COUNTS AND CAUSES OF ACTION SET FORTH THEREIN ALLEGES:

I.

That it is and at all times referred to in plaintiff's complaint was a Wisconsin corporation, the owner of and engaged in operating a line of railroad extending from Chicago, Illinois to Puget Sound in the State of Washington, and passing through the intervening states, including Montana, which line of railroad was and is used in the transportation of person and property. That in connection with its said railroad, the defendant maintained and still maintains certain shops at Deer Lodge, Powell County, Montana. That in the fall of 1933 a fire occurred which burned certain property at the said shops and it became necessary to clean up certain debris [59] resulting therefrom.

II.

That in and about the said work there was used a certain Mack truck, which was furnished and provided by the City of Deer Lodge, Montana, and which was owned by said municipality. That the plaintiff herein who was an experienced truck driver and who had for many months prior thereto driven said truck so furnished by the City of Deer Lodge was employed by the defendant as the driver of said

truck. That while operating said truck the plaintiff of his own volition and without the knowledge of, or any suggestion or direction from the defendant, assumed to make some examination of and about the engine of said truck and negligently and carelessly and without any necessity requiring him so to do, brought his hand into contact with the fan or some other moving part of the truck and negligently and carelessly failed to keep his hand at a safe distance from said moving parts as he could have done. That the said fan and such moving parts were so located that there was no necessity whatsoever of plaintiff coming near or in contact with the same, and that the plaintiff so negligently and carelessly and without exercising any care whatsoever for his own safety, came in contact with said fan or other moving parts of said motor and sustained injury to certain of his fingers. And this defendant alleges that such injury resulted from the plaintiff's own negligence and not otherwise. [60]

[Amendment allowed and filed Sept. 27, 1935. C. R. Garlow, Clerk.]

For a further and separate answer to the complaint of plaintiff herein, defendant alleges that it is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, is a common carrier engaged in interstate and intrastate commerce in the states of Illinois, Wisconsin, Minnesota, North Dakota, South Dakota, Montana,

Idaho and Washington, among others; and further alleges that on June 29, 1935, in a proceeding brought in the District Court of the United States, for the Northern District of Illinois, Eastern Division, entitled "In the Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, and numbered 60463 in the files of the Clerk of said Court, the defendant herein filed a verified petition pursuant to Section 77 of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," approved July 1, 1898, and the acts amendatory thereof and supplementary thereto; that pursuant thereto and on that same date the aforementioned District Court of the United States by its Order No. 1 in said proceedings, ordered that said petition be, and the same was thereby approved as properly filed under Section 77 of said act; by paragraph 5 of said order the defendant herein was and now is authorized and empowered, among other things, to defend any claim, demand or cause of action, whether or not suit or other proceedings to enforce the same had been brought in any court or tribunal; that by paragraph 10 thereof all persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, were thereby and now are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, or enforcing liens upon or in any manner whatsoever disturbing any portion of the assets,

goods, money, railroads, properties or premises belonging to or in possession of the defendant herein. [61]

WHEREFORE, having fully answered, the defendant prays to be dismissed with its costs herein expended.

MURPHY & WHITLOCK,
Missoula, Montana.
Attorneys for Defendant. [62]

State of Montana,
County of Missoula—ss.

A. N. Whitlock being first duly sworn on oath deposes and says; that he is one of the attorneys for the defendant named in the above entitled action, and makes this verification for and on behalf of said defendant for the reason that it is a corporation and has no officer within the county where affiant resides; that he has read the foregoing answer, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

A. N. WHITLOCK.

Subscribed and sworn to before me this 27th day of July, 1934.

[Seal] HOWARD TOOLE
Notary Public for the State of Montana residing at Missoula, Montana; my commission expires Jan. 30, 1936. [63]

State of Montana,
County of Missoula—ss.

Lillian A. Smith, being first duly sworn upon her oath, deposes and says: that she is of legal age and in no way interested in the foregoing action; that Murphy & Whitlock, attorneys for the defendant in the foregoing action, reside and have their offices at Missoula, and that T. J. Davis, Esq., and W. L. Emerson, Esq., attorneys for the plaintiff therein, reside and have their offices at Butte, Silver Bow County, Montana; that there is regular communication by mail between said cities. That on the 27th day of July, 1934 she served the foregoing answer of the defendant in said action upon T. J. Davis, one of the attorneys for the plaintiff by depositing in the United States Postoffice at Missoula, Montana a sealed envelope bearing the necessary postage, addressed to T. J. Davis, Attorney at Law, Butte, Montana and containing a full, true and correct copy of said Answer.

LILLIAN A. SMITH.

Subscribed and sworn to before me this 27th day of July, 1934.

[Seal] HOWARD TOOLE
Notary Public for the State of Montana, residing at Missoula, Montana. My commission expires Jan. 30, 1936.

[Endorsed]: Filed July 30, 1934. C. R. Garlow, Clerk. [64]

Thereafter, on August 17th, 1934, Reply was duly filed herein, in the words and figures following, to wit: [65]

[Title of Court and Cause.]

REPLY

Comes now the plaintiff in the above entitled action and replying to defendant's answer on file herein denies, affirms, and alleges as follows, to-wit:

I.

Replying to the allegations contained in Paragraph V upon page 2 of defendant's answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 2.

II.

Further replying to defendant's answer and particularly replying to the allegations contained in Paragraph V upon page 4 of defendant's alleged answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 4.

III.

Further replying to defendant's answer and particularly replying to the allegations contained in Paragraph V upon page 6 of defendant's alleged

answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 6. [66]

IV.

Further replying to defendant's answer and particularly replying to the allegations contained in Paragraph V upon page 8 of defendant's alleged answer, this plaintiff admits that the plaintiff opened the hood of the truck which he was driving as alleged in plaintiff's complaint, but denies each and every other allegation contained in said Paragraph V upon page 8.

V.

Further replying to defendant's alleged further answer and first separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph I thereof, this plaintiff admits the allegations contained in Paragraph I of said alleged further answer and first separate defense.

VI.

Further replying to defendant's alleged further answer and first separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph II thereof, this plaintiff admits that

plaintiff herein was an experienced truck driver; but denies each and every other allegation contained in said Paragraph II of said alleged further answer and first separate defense.

VII.

Further replying to defendant's alleged further answer and second separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph I thereof, this plaintiff admits the allegations contained in Paragraph I of said alleged further answer and second separate defense.

[67]

VIII.

Further replying to defendant's alleged further answer and second separate defense to the plaintiff's complaint and to each and all of the alleged counts and causes of action therein contained, and particularly replying to the allegations contained in Paragraph II thereof, this plaintiff admits that plaintiff herein was an experienced truck driver; but denies each and every other allegation contained in said Paragraph II of said alleged further answer and second separate defense.

IX.

Further replying to defendant's answer on file herein, this plaintiff denies each and every allegation contained in said answer and said alleged fur-

ther and separate defenses filed herein by the defendant, which have not been heretofore admitted, qualified, or denied.

WHEREFORE, Plaintiff having fully replied to defendant's answer on file herein prays judgment in conformity with the allegations and prayer of his complaint on file herein.

W. L. EMERSON
T. J. DAVIS
Attorneys for Plaintiff. [68]

State of Montana,
County of Silver Bow—ss.

T. J. Davis, being first duly sworn, on his oath deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that the plaintiff is absent from the County of Silver Bow, State of Montana, where affiant resides, and for that reason this verification is made by affiant; that affiant has read the above and foregoing Reply, and knows the contents thereof, and that the same is true to the best knowledge, information and belief of affiant.

T. J. DAVIS.

Subscribed and sworn to before me this 16th day of August, A. D. 1934.

[Notarial Seal] G. V. BREW
Notary Public for the State of Montana. Residing at Butte, Montana. My commission expires Aug. 18, 1934.

[Endorsed]: Filed Aug. 17, 1934. C. R. Garlow, Clerk. [69]

Thereafter, on September 27th, 1935, said cause came on regularly for trial and was tried on September 27th, 28th, and 30th, 1935, the record thereof being in the words and figures following, to-wit:

RECORD OF TRIAL OF SEPTEMBER 27, 1935

No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

This cause came on regularly for trial this day, Mr. T. J. Davis and Mr. H. L. Maury appearing for the plaintiff and Mr. Wm. L. Murphy and Mr. J. C. Garlington appearing for the defendant.

Mr. W. P. Halloran of Anaconda, Montana, acted as court reporter.

Thereupon Mr. Murphy stated to the court that the defendant company has instituted certain bankruptcy proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, and for that reason desires at this time to amend its Answer herein by adding an additional paragraph setting out the fact of such bankruptcy, and there being no objection on the part of the plaintiff, court ordered that the record show that the defendant's said request is granted and that by agreement of counsel, expressed in open court, the new matter added to the Answer is deemed denied.

Thereupon the impanelling of a jury was proceeded with; and during the examination on voir dire of juror Fred Danzer, it appearing that said juror is not possessed of all his natural faculties and is unable to hear the testimony which will be introduced upon the trial of this and other cases, court ordered

that he be permanently excused from further service on the present jury panel pursuant to section 8889, Revised Codes of Montana of 1921.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the case, viz.

Harvey L. Keene, Fred Vincent, M. J. Irvin, George Priest, William A. Tatem, Wylie Ashworth, Forrest E. Norris, D. W. Shearer, W. J. Pendergast, A. R. Schopfer, Otto Van Horn, Sr., and F. B. Nickerson. [70]

Thereupon counsel for defendant moved the court for leave to amend the separate defense in the answer to show that such negligence contributed to the injury, if any, complained of, which motion was by the court denied as being now too late, and to which ruling of the court the defendant then and there excepted and exception duly noted.

Thereupon James Gilbert was sworn as a witness for the plaintiff, whereupon the defendant objected to the introduction of any evidence for the reason the complaint fails to state a cause of action, which objection was by the court overruled, and exception of defendant duly taken and noted.

Thereupon James Gilbert, having been sworn, testified as a witness for the plaintiff. Thereupon William Arthur, Clark Cutler, Edward Sears, Elwyn Dildine, C. L. Stubbs, Clifford Gilbert and John Truscott were sworn and examined as witnesses for the plaintiff and a piece of metal marked "Plain-

tiff's Exhibit No. 1", was offered and admitted in evidence, whereupon the plaintiff rested.

During the course of the trial, court ordered that the record show that the parties are granted an exception to all adverse rulings of the court without requesting the same.

Thereupon Edward Sears was recalled as a witness for the defendant, whereupon further trial of the cause was ordered continued until 10 A. M. tomorrow and the jury excused until that time.

Entered in open court September 27th, 1935.

C. R. GARLOW,
Clerk. [71]

RECORD OF TRIAL OF SEPTEMBER 28, 1935

No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Counsel for the respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Edward Sears was recalled as a witness for the defendant, and E. A. McLeod, J. O. Jones, Carl Zur Muehlen, Albert Schurman, S. W. Hulben, James O'Neill and George Shue were sworn and examined as witnesses for the defendant, exhibits Nos. 2, 3, 4, 5, 6, 7 and 8, for the defendant, being offered and admitted in evidence, and exhibits 1-A 9 and 10, for the plaintiff, being offered and admitted in evidence. In connection with the testimony of the witness Albert Schurman the defendant made a certain written offer of proof,

to which the plaintiff objected, and the objection was by the court sustained and the offer denied.

And thereupon further trial of the cause was ordered continued until Monday, September 30th, 1935, at 10 A. M., and the jury excused until that time.

Entered in open court September 28th, 1935.

C. R. GARLOW,
Clerk. [72]

RECORD OF TRIAL OF SEPTEMBER 30, 1935

No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Counsel for the respective parties, with the jury, present as before and trial of cause resumed.

Thereupon George Shue was recalled as a witness for the defendant, and J. M. Dennis, Walter Stephens and L. E. Neumen were sworn and examined as witnesses for the defendant, exhibit No. 11, for the defendant, being offered and admitted in evidence.

Thereupon, on the motion of counsel for the defendant, to which the plaintiff had no objection, court ordered that a copy of exhibit No. 11 be made by the court reporter and when certified by the clerk it be substituted in the files herein for original exhibit No. 11 and said Original exhibit be returned to counsel for the defendant.

Thereupon the defendant rested.

Thereupon James Gilbert was recalled as a witness in rebuttal, whereupon the plaintiff rested and the evidence closed.

And thereupon the defendant moved the court for a directed verdict for lack of proof and on other grounds stated, which motion was by the court denied.

Thereupon counsel for the plaintiff stated to the court that plaintiff now elects to stand on the counts of the complaint relating to intrastate commerce and consents to a dismissal of the two counts of the complaint relating to interstate commerce; whereupon court ordered that the record show that on motion of plaintiff's counsel counts one and two contained in the complaint in this action are dismissed and judgment of dismissal as to said counts ordered entered.

Thereupon the defendant renewed its motion for a directed verdict, which motion was by the court denied.

Thereupon, after the arguments of counsel, the court announced that it intended to give instructions requested by plaintiff Nos. 1, 2, 3, 4, and 6 and refuse to give plaintiff's requested instruction No. 5, to which no exception was taken. [73]

Thereupon court announced that it intended to give instructions requested by defendant Nos. 1, 2, 3, 4, 12, 17, 18 and 19, and refuse to give defendant's requested instructions Nos. 5, 6, 7, 8, 9, 10, 11, 13, 14, 15 and 16, to which refusal the defendant's counsel then and there excepted.

Thereupon, after the instructions of the court, the jury retired to consider of its verdict, in charge of the bailiffs who were sworn in open court.

By agreement of respective counsel, expressed in open court, court ordered that the clerk is authorized and directed to see that all exhibits introduced in evidence are delivered to the jury in the jury room.

Thereafter, at 8 P. M. this day, the jury returned into open court for further instructions, counsel for all parties being present.

Thereupon the court inquired of counsel whether or not they wished a stenographic report of the proceedings taken, whereupon Mr. Murphy, counsel for defendant, stated that the stenographer had gone, none was then provided and no stenographic report was taken.

And thereupon, after hearing the further instructions of the court, the jury again retired to consider of its verdict, the court remaining in session awaiting the verdict of the jury.

And thereafter, at the hour of 12:05 A. M., on October 1st, 1935, the jury returned into open court with its verdict, which verdict was duly received by the court, read and filed, and by the jury acknowledged to be its true verdict as follows, to-wit:

[Title of Court and Cause.]

"We, the jury, in the above entitled cause, find our verdict in favor of the plaintiff, Clifford Gilbert, and against the defendant, Chi-

cago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we do hereby assess the amount of plaintiff's damages in the sum of Thirty-five Hundred (3500.00) Dollars. George Priest, Foreman of the jury."

Thereupon court ordered that judgment be entered in accordance with the verdict.

Entered in open court September 30th, 1935.

C. R. GARLOW,
Clerk. [74]

Thereafter on the 1st day of October, 1935, the verdict of the jury was duly filed and entered herein, in the words and figures following, to-wit:

[Title of Court and Cause.]

We, the jury in the above entitled cause find our verdict in favor of the plaintiff Clifford Gilbert, and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we do hereby assess the amount of plaintiff's damages in the sum of Thirty-five Hundred (3500.00) Dollars.

GEORGE PRIEST,
Foreman of the Jury.

Thereafter, on October 2, 1935, an order granting to the appellant an extension of time to and including the 30th day of October, 1935, within which to file its bill of exceptions, was duly made and entered, in the words and figures following, to-wit:

[75]

[Title of Court and Cause.]

ORDER GRANTING EXTENSION OF TIME.

Counsel for the defendant in the above entitled action having made application to this court for an extension of time within which to prepare, serve and file its Bill of Exceptions in the above entitled cause and it appearing to the court that respective counsel for the plaintiff and defendant have by written stipulation heretofore filed stipulated and agreed that the court may extend the time within which the defendant may prepare, serve and file its Bill of Exceptions to and including the 30th day of October, 1935.

NOW, THEREFORE, pursuant to rule 81 of the rules of practice of the above named court, the defendant is hereby granted an extension of time to and including the 30th day of October, 1935 within which to prepare, serve and file its Bill of Exceptions in the above entitled cause and the time for filing the same is hereby extended to and including said 30th day of October, 1935.

Dated this 2nd day of October, 1935.

JAMES H. BALDWIN,
District Judge.

[Endorsed]: Filed Oct. 2, 1935. C. R. Garlow, Clerk. [76]

Thereafter, on October 5, 1935, judgment was duly entered herein, being in the words and figures following, to-wit:

In the District Court of the United States, District of Montana, Helena Division

No. 1622

CLIFFORD GILBERT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

JUDGMENT.

This cause and action came regularly on for trial on the 27th, 28th, and 30th days of September, A. D. 1935, before the Court sitting with a jury, the plaintiff appearing in person and by his attorneys, H. L. Maury, Esq. and T. J. Davis, and the defendant appearing by its attorneys, William Murphy, Esq., and J. C. Garlington, Esq.

Witnesses on the part of the plaintiff and defendant were sworn and on completion of the plaintiff's proof and after plaintiff had rested, the defendant submitted evidence in its defense, and at the close of all the evidence and after both parties, to-wit: Clifford Gilbert and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, announced in open court that they and each

of them rested, the Court instructed the jury. Thereupon the cause and evidence was argued by the attorneys for the respective parties and at the close of said [77] arguments the jury retired to consider its verdict, and subsequently returned into open court with its verdict, which said verdict, after the title of the court and cause, was and is in the following words and figures, to-wit:

[After Title of Court and Cause.]

"We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we assess plaintiff's damages in the sum of $3500.00.

GEORGE PRIEST
Foreman of the Jury.

NOW, THEREFORE, by reason of the premises aforesaid, and by virtue of the law, IT IS ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree, that the plaintiff, Clifford Gilbert, have and recover of and from the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the sum of Three Thousand, Five Hundred Dollars ($3,500.00), together with plaintiff's costs necessarily expended in this action amounting to the sum of Sixty & 60/100 Dollars ($60.60).

Dated and entered this 5th day of October, A. D. 1935.

C. R. GARLOW,
Clerk. [78]

Thereafter, on October 24th, 1935, Defendant served on Plaintiff its proposed Bill of Exceptions and lodged the same in the Clerk's office on October 29th, 1935.

And thereafter, on January 3rd, 1936, said Bill of Exceptions was by the court signed, settled and allowed and filed herein, being in the words and figures following, to wit: [79]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS

BE IT REMEMBERED: That this cause came on regularly for trial before the Honorable James H. Baldwin, Judge of the District Court of the United States for the District of Montana, sitting with a jury, on the 27th day of September, 1935. H. L. Maury, Esq., and T. J. Davis, Esq., appeared as counsel for the plaintiff, and W. L. Murphy, Esq., and J. C. Garlington, Esq., appeared as counsel for the defendant.

Thereupon, the following proceedings were had, orders made, objections interposed, rulings made by the Court and exceptions taken, and the following evidence offered or introduced on the trial of this cause, to-wit: [80]

Mr. MURPHY: If the Court please, since the pleadings in this case were prepared the Milwaukee Railroad has been subjected to bankruptcy proceedings and is now in the Federal District Court of the Northern District of Illinois. I thought it good practice, and now ask leave of Court, to file an additional paragraph to the answer, setting out the fact of the bankruptcy. I have furnished coun-

sel with a copy of that paragraph. It is purely formal, and it in no manner changes the issues, so far as I am aware.

Mr. MAURY: I do not think, your Honor, that it much changes the issues This being an action for tort, the Court proceeds in an action at law. The only question is whether or not, if the plaintiff is successful, an execution can be levied. It goes only, as I take it, to the question of an execution, does it not, Mr. Murphy?

Mr. MURPHY: As I understand the orders heretofore made in this bankruptcy proceeding, the court has said that the Railroad Company may defend actions as though it were not in bankruptcy, but has made an order that its assets shall not be subject to levy, attachment, or other impounding; and I think that the order provides that the defense of an action shall not be at all to the prejudice of the defendant, its creditors, trustees, or other persons hereafter appointed.

Mr. MAURY: I think that is all right; and, so far as we are concerned, the amendment may be deemed denied by the reply.

The COURT: Let the record show that the request of the defendant for leave to amend its answer is granted, and that by agreement of counsel and by request in open court the new matter added to the answer is, for the purposes of this trial, deemed denied. File it by attaching it to the answer. [82]

PLAINTIFF'S CASE

OPENING STATEMENT

Mr. MAURY: If your Honor please, Counsel for the railway company, and Gentlemen of the Jury: This young man, Clifford Gilbert, brought this action against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, by and through his guardian ad litem. When he brought the action he was not of the age of twenty-one years, but he has now attained the age of twenty-one years, so that I think it fitting that the Court release the guardian ad litem and the action proceed just in the name of the young man. It is alleged in this complaint at law that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company is a common carrier, engaged in interstate commerce, and that the young man, Clifford Gilbert, was engaged in interstate commerce; that at the time he was injured, on the 30th day of October, 1933, plaintiff was a servant of the defendant, and employed by the defendant in interstate commerce. * * * We will show you, Gentlemen of the Jury, that this is an action under what is called "The Railroad Act of Congress for the Compensation in Money to Servants Injured by Defective Appliances Furnished by Railroads for Their Servants to Work With"; that the young man, Clifford Gilbert, was engaged in interstate commerce. He was engaged in taking debris from the main line of the Milwaukee Railroad. * * *

Mr. MURPHY: May it please the Court, in view of the statement made by counsel I desire to

call the Court's attention to the fact that in the answer of the defendant there is a special separate defense in which certain negligent acts on the part of the plaintiff are set out and designated as primary negligence. I ask leave of court to incorporate the same paragraph as a fur- [83] ther and separate defense, with the change only that such negligence contributed to the injury, if any, concerning which the plaintiff complains. I make that request, your Honor, because apparently, in view of the statement made by counsel, the theory of counsel is that this plaintiff, as well as the defendant, were, at the time of the accident, engaged in interstate commerce. There would be no change in the pleadings or the wording of the separate defense.

The COURT: If there is no change there is no purpose for the amendment, and the request is denied.

Mr. MURPHY: I said there is no change except in pleading primary negligence we would desire to allege that those acts of negligence already pleaded are of such a nature as contributed to the injury, if any, concerning which the plaintiff complains.

The COURT: In my view the statement merely follows the allegations of the pleadings, of which you had notice. You have pleaded assumption of risk and contributory neglect as affirmative defenses. The application comes too late and is denied.

Mr. MURPHY: We note our exception to the ruling of the Court.

The COURT: May I ask whether all parties agree that the company and the employee were engaged in interstate commerce, or is there an issue on that?

Mr. MAURY: We agree. Our testimony, I believe, will show that they were both engaged in interstate commerce.

Mr. MURPHY: Our investigation of the facts and our understanding of the law are such that we cannot agree that this plaintiff was engaged in interstate commerce.

Mr. MAURY: Because of the delicacy of that question we have pleaded both ways.

The COURT: I notice you have two strings to the bow. We [84] will proceed with the testimony.

JAMES GILBERT,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Maury:

Q. Your name is James Gilbert?

Mr. MURPHY: If the Court please, I desire at this time, as a matter of precaution, to interpose an objection to the introduction of any evidence in this case whatsoever upon the ground that the complaint does not state a cause of action; and particularly in view of the opening statement of counsel to the jury of the allegations of the complaint

(Testimony of James Gilbert.)

in reference to the manner and happening of this accident, in that the manner and happening thereof would be contrary to physical laws, and could not be anticipated, foreseen, or guarded against.

The COURT: The objection is overruled.

Mr. MURPHY: Note our exception.

A. Yes, sir.

The WITNESS: I have lived in Deer Lodge, Montana, for the past thirty-six years. I am Fire Chief and Street Commissioner of Deer Lodge at the present time. The plaintiff, who is now twenty-one years of age, is my son. I am acquainted with the Mack truck which was used by the Milwaukee Railroad in October, 1933, in cleaning debris from the railroad right-of-way.

Q. Do you know where that truck came from?

A. Yes, sir.

Q. How do you know?

A. Because I came over and got it from the State Highway Com- [85] mission, over here at Helena.

Q. Who brought the truck from the Highway Commission to the city of Deer Lodge?

A. I did.

Mr. MURPHY: May it please the Court, I will object to that question and to questions of a similar character calculated to extract information as to where the truck came from and as to its age and condition generally, except as to the condition concerning which specific complaint is made, and which,

(Testimony of James Gilbert.)

under the complaint and under the statement of counsel, is the sole alleged ground and cause of the injury.

The COURT: It is a circumstance that I think can properly be considered. The objection is overruled.

Mr. MURPHY: Note our exception.

The WITNESS: When I came to Helena to get the truck, which was twelve years ago, it looked like an old truck to me. The first three or four years after we got the truck to Deer Lodge we used it quite a bit, but after that we did not. It was a Mack truck. I occasionally drove it personally.

Q. Confining yourself to times before October, 1933, describe to the jury anything out of the ordinary that that truck did or did not do.

A. Well, it never would hit——

Mr. MURPHY: May it please the Court—and I think this objection will cover the whole situation—

The COURT: Of course, Mr. Maury, I expect you to confine yourself to the specific defects alleged in the pleadings.

Mr. MAURY: We are going to keep within those.

[86]

The COURT: You allege that the truck was old and worn, dangerous and unsafe for use by the plaintiff in this case. Now, in my view of pleading, you have confined yourself by your allegations in

(Testimony of James Gilbert.)

this complaint to the specific statements set out in Paragraphs 3, 4, and 5 of your pleading.

Q. Mr. Gilbert, you may describe what happened in connection with this truck prior to October, 1933; that is, how it acted with reference to the fan belt, the shaft on which the fan revolved, and the fan itself.

Mr. MURPHY: That is objected to as too remote, not being definite as to time. It may have been long before this accident. It is further objected to for the reason that the specific allegation is with reference to the explosion of the fan; and the various allegations in the complaint with reference to the pump and the oil and other defects and outworn conditions apparently have nothing to do with the accident or its cause.

The COURT: The objection is overruled.

Mr. MURPHY: Note our exception.

A. Well, the fan belt was breaking quite often. The fan belt runs on a fly-wheel. The bearing in the fly-wheel was loose and it wobbled. It had a tendency to jump and break the belt. The belt set in a little groove, and the fan was a little loose, and if it would give a quarter of an inch it would bind that belt in that groove and break.

The WITNESS: I saw the belt break, I guess, ten or twelve times. It kept on breaking all the time, and we kept repairing it. I made a new one and that also broke. I do not know exactly the time at which this truck was delivered to the Milwaukee

(Testimony of James Gilbert.)

Rail- [87] road, but I know we towed it over there. We could not start it. The clutch was froze, and we could not get the car in gear or out of gear, and we had to pull it over to the Milwaukee. I delivered the truck to the Milwaukee at the request of the Mayor of Deer Lodge. I cannot remember to whom I delivered the truck. I took it over to the Milwaukee and left it there. I believe Mr. Sears, the Master Mechanic, was there at the time. The body of this truck came from an old truck that was smashed by the Northern Pacific about fourteen years ago. At the time we took the truck to the Milwaukee it was impossible to start it without either towing it or allowing it to run down a hillside. I had seen people trying to start it previous to that, and we had tried for hours at a time to start it. Practically every time we used it it was necessary to drag it through the streets of Deer Lodge in order to start it. Sometimes it would be necessary to drag it only a hundred feet, sometimes two blocks, and sometimes three or four. It had never been equipped with a self-starter. While it was supposed to be started by cranking, I do not believe it was possible to start it by cranking it unless it was awfully warm outside. Everytime we took the truck out and ran it more than four or five blocks it boiled, and we would have to carry water with us. The day my son, the plaintiff, was injured Mr. Sears came to the house and told me my son had been hurt. He said that while he had not been hurt bad he had had his

(Testimony of James Gilbert.)

hand cut. I went to the doctor's office, and there I saw that my son's third finger was hanging down and the little finger was all cut. The third finger was removed, and while he still has the little finger, it does not amount to much.

Mr. MURPHY: Merely for the purpose of preserving the record as to the condition of the truck and its age [88] and where it came from, we move to strike from the testimony of the witness that evidence of the nature indicated as being immaterial and non-probative in this case and outside the material issues.

The COURT: The motion is denied.

Mr. MURPHY: Note our exception.

Cross-Examination by Mr. Garlington.

The WITNESS: We have repaired this truck from time to time. As Street Commissioner I take care of all the road machinery of the city of Deer Lodge. I am a mechanic by experience but not by trade. During the last three or four years I had not been familiar with the condition of the truck, as we had not repaired it during that time. I knew its condition prior to that time. I drove the truck occasionally, and several others, including the plaintiff, also drove it. I would not say for sure, but I think the plaintiff first began to drive the truck six or seven years previous. He did not help me around the shop, but he occasionally worked for me on the streets and drove the truck. He may have gained

(Testimony of James Gilbert.)

some of his mechanical skill while working for me, but he also worked for Floyd Gerrish around the garage. I would not be sure, but I believe the last time the truck was used prior to its delivery to the Milwaukee was the previous spring, when the county had it in use for two or three months and during which time it was being driven by the plaintiff. The previous winter it was used in hauling crushed rock for the city, but the plaintiff was not driving it at that time. It was being driven by William Arthur. I do not remember whether, during that time, the plaintiff was around the shop with me. I cannot recall of any certain previous occasions when the plaintiff drove the truck. It was driven by several different persons and I did not [89] take particular notice to who was driving it. However, I do recall that on previous occasions over a period of five or six or seven years Clifford Gilbert, the plaintiff, drove the truck. I cannot say whether during that time the plaintiff assisted me in the repairing of the truck. We used to do all the work we could in the repairing of the truck, and we also took it to other garages. The truck had been defective ever since we got it. I put water in it a thousand times before I got it from Helena to Deer Lodge. The truck had floor boards in it, and they were in it at the time I first got the truck. The truck had to be towed to the Milwaukee shops. I do not remember who sat in the truck and guided it. I pulled it over. I do not think Clifford was with me on that occasion. I think

(Testimony of James Gilbert.)

he was at home. I left the truck in the yards in front of the shops that burned, and then I left. In the cab of the truck there is a large, circular opening, covered by a very wide mesh guard, through which the fan can draw air into the radiator, and the fan is, to all intents and purposes, completely visible. One end of the axle or bearing on which the fan rotates projects out into a support that is in the cab, and on the other end is another support for the bearing. The support on the other end may have been an inch or so to one side or the other, but it is substantially opposite the pet-cock on the fourth cylinder. I believe that pet-cock and the protruding end of the fan were about five or six inches from each other. The housing in which the fan operated, on the side toward the motor, was entirely open, so that anyone standing at the side of the motor and watching it operate could see the fan as it rotated. There were four cross members in front.

Redirect Examination by Mr. Maury:

Q. Can you tell us whether there was any peculiar noise that [90] the fan or the machinery rotating the fan made?

Mr. MURPHY: That is objected to, your Honor, for the same reasons heretofore stated in other objections, as being outside the issues, immaterial, and not probative in this case.

(Testimony of James Gilbert.)

The COURT: In my opinion, Mr. Murphy, it has a tendency to show knowledge, and for that reason I think it is material.

Mr. GARLINGTON: We should like to make the further objection that it is not proper redirect examination.

Mr. MAURY: We ask leave to ask it as direct.

The COURT: Leave is granted and the objection is overruled.

Mr. MURPHY: We wish to note an exception.

A. Yes, sir; there was a kind of a grind—kind of a knock.

The WITNESS: I cannot say how long this knock existed, but it was for a long time before the accident. I recall noticing it when we were hauling crushed rock for the city in 1932. I saw the truck after Clifford was injured, and at that time it had not been repaired in any way since it had been towed over to the Milwaukee shops. I cannot tell you of what material the truck fan was made. Exhibit 1, for identification, is a piece of the fan.

Recross Examination by Mr. Garlington:

The WITNESS: You could hear this noise of which I spoke any time that you started the motor, except when the fan belt was broke, and then you could not hear it. All the time the truck was in operation and the fan belt was on the noise was present and could be heard by the driver or by any

(Testimony of James Gilbert.)

person about the truck. I guess it was about two hours and a half, or something [91] like that, after the accident that I saw the truck.

Re-Redirect Examination by Mr. Maury:

The WITNESS: When I saw the truck after the accident it was at the Milwaukee shops.

WILLIAM ARTHUR,

called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is William Arthur. I have been a resident of Deer Lodge, Montana, since January 20, 1920. I am a switchman, but I have driven a truck. During the winter of 1932 for part time during two months I drove the Mack truck owned by the city of Deer Lodge. I was employed by the city of Deer Lodge as a truck driver at that time, and I was engaged in hauling crushed rock onto the streets. The Mack truck was an old dump truck. I operated the truck myself. At that time we had trouble starting it in the morning. It had no self-starter on it, and we would usually have to tow it a block before it would start. I do not know what year's model the truck was. The truck would heat when I drove it, and when I would drive it about eight or ten blocks I would have to put water in the radiator. With a load the truck would heat up in a distance of about three blocks. When

(Testimony of William Arthur.)

the motor was cold the truck would jerk, but when the motor warmed up it seemed to run fairly smooth. When it would jerk I would do nothing about it, and I did not attempt to regulate the carburetion or the gasoline flow. It has been so long ago that I could not give a very good description of the fan on this truck. I believe you could see a part of the fan from the driver's seat, and, if you raised the hood, you could [92] see the fan from the front end of the truck. It seemed to be more or less closed in, being sort of bellows-shaped and in an enclosure, with, I believe, four strips across the enclosure with spaces between the strips so that the fan was plainly visible. I would judge the fan was six or eight inches in back of the motor. I think the fan belt broke twice while I was driving the truck. My theory of the cause of its breaking is that the belt was too old, as it looked as though it had been on the fan ever since the truck was built. I think Mr. Gilbert told me this was one of the trucks used during the war.

Q. In the *draggin* of this truck for at least a block, as you have stated, Mr. Arthur, what have you to say as to whether or not it was necessary to prime the cylinders in order to start the motor, particularly if it had stood idle for some time?

Mr. MURPHY: That is objected to, your Honor, for the reason that the evidence shows the engine was running at the time of this accident, and there was no occasion to prime it. It is imma-

(Testimony of William Arthur.)

terial whether pleaded in the complaint or not. It is a matter that has no probative value here.

Mr. DAVIS: We offer it simply for the purpose of showing the condition that could be found even by a casual inspection. If this car was difficult to start and had to be dragged, it was notice to anyone using the truck; and we have pleaded it was an old, decrepit truck.

The COURT: Is not the real question involved here with reference to the fan and bearing and connections?

Mr. DAVIS: That is true, but we have pleaded also that the engine was in bad condition, that it heated up, that the pistons did not hold the oil, and that the en- [93] gine generally was in such bad condition as to cause it to buck, and that this condition resulted from the fan failing to work.

The COURT: If you are prepared to show those things, it is within the issues, but you must connect this up. These matters are allowed to go in merely on the question of the giving of notice to the company or anyone interested, and if you wish to confine it to that by instruction, the jury will be so instructed. The objection is overruled.

Mr. MURPHY: Note our exception.

A. I don't think that I ever tried to start the truck after it stood idle for a long time.

The WITNESS: We would leave the truck at night, and the following morning it was at times necessary to drag it in order to start it. I do not

(Testimony of William Arthur.)

remember of ever having had to tow it more than a block to get it started during the time I drove it. We never primed it during the time I drove it because the primers were plugged up with dirt. About the only time I remember that the truck would jerk is when there was a heavy load on it and you would get into a tight pull, or something like that.

Q. What have you to say as to the manner in which the body of the truck worked?

Mr. MURPHY: That is objected to, your Honor, for the reason that the body is not mentioned in the complaint at all. I shall make no further objections along this line. I think the Court has my position, that these matters are not probative and are not connected with and have nothing to do with the manner and mode of this action. [94]

Mr. DAVIS: May it please the Court, it is pleaded that an oil compression was used in the dumping process of this truck, it being an automatic dump truck, and that the oil used was not of the right type, being not heavy enough; and that also the cylinders containing the oil permitted the oil to exude.

The COURT: Were they connected with the fan?

Mr. DAVIS: In this way, your Honor: we see it as proving that this was an old, worn truck, and that the condition of the truck was such that its condition was called to the attention of any person using it in his work; and it shows the need of at least a cursory inspection before using it.

(Testimony of William Arthur.)

The COURT: I think you have proceeded far enough along that line.

(It being noon, a recess was taken until two o'clock p. m.)

Cross-Examination by Mr. Garlington

The WITNESS: The radiator and fan of this truck are to the rear of the motor and between the motor and the cab of the truck, the radiator and the fan forming, more or less, the dashboard of the truck. There is no fan or similar appliance at the head end of the truck. The hood is one piece that raises up from the front, hinging on a coil near the dashboard of the truck. When I was operating this truck it was winter time, and in the cold weather it was necessary to tow the truck about a block to get it started. Clifford Gilbert was not with me during any of the winter of 1932 while I was driving this truck. The radiator did not leak much. In fact, we had anti-freeze in it part of the winter. I had no trouble with the truck other than as I have mentioned. [95]

Redirect Examination by Mr. Davis

The WITNESS: The fact is that the radiator did not leak to any appreciable extent while I was driving the truck. However, the engine heated. The hood was one solid piece that lifted up toward the driver's seat. Mr. Gilbert, the plaintiff, did not ride with me while I was driving the truck. At

(Testimony of William Arthur.)
the present time I am employed as a switchman by the Milwaukee Railroad, the defendant in this case.

CLARK CUTLER,

called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Maury

The WITNESS: My name is Clark Cutler. I have resided at Deer Lodge, Montana, for twenty years. I am acquainted a little with the Mack truck owned by the city of Deer Lodge and that was turned over to the Milwaukee Railroad. I do not remember just when it was that I started to work for the city and became acquainted with that truck, but I think it was in 1933. I do not remember when Clifford Gilbert was hurt or when it was the truck was being used for hauling debris from the Milwaukee yards. We first used the truck for hauling crushed gravel, which was, I think, in the spring of 1933. It was probably a month or two that the truck was used on that occasion. I was just working there, and I was not using the truck, although I rode in it. I noticed that the water in the radiator would heat and boil over and that they would have an awful time starting it. It had to be towed sometimes three blocks and sometimes less to get it started. I do not remember of ever seeing it start without being towed. It seemed to run pretty good

(Testimony of Clark Cutler.)

when it got going I remember of only [96] one time when they had trouble with the fan belt. It broke just as the truck was being driven away from the crusher. I do not know and could not figure out why it broke. I do not know if the fan belt had been broken previously or not, as I was quite a ways from the truck when the belt broke and I did not go over to the truck to see the belt. I knew the belt broke because Clifford Gilbert, who was driving the truck, had the belt in his hand; but I was on the other end of the crusher, and I could not see from there if the belt had been broken before. The truck would heat up whether it was climbing a hill or being run on the level, and the radiator had to be filled with water pretty often. They had to carry water with them to fill it. I do not know just how far the truck would run between fillings, but probably four or five blocks sometimes. I do not know over how long a time I observed that condition. The truck is now over at the Milwaukee shops. It has not been used the last year or so that I know of. I am not very familiar with the Milwaukee yards, so I could not state in just which building the truck now is. I do not know where the priming cocks on that truck are located, as I have never looked at the motor much.

Cross-Examination by Mr. Garlington

The WITNESS: In the spring of 1933 I was employed on the rock crusher by the city of Deer Lodge. Clifford Gilbert drove the truck during the

(Testimony of Clark Cutler.)

full period that I worked there. The crusher had a screen over the conveyor belt, and my work was to pick the big rocks that would not go through the screen off the conveyor belt. My work during all the time was at the crusher. During the time I worked on the crusher I noticed that the truck would heat up. My only occasion to ride on this truck was in going to and from my work. Inasmuch as I was not close enough to the [97] truck to see, I could not tell you if when the fan belt would break the fan itself would cease to revolve.

EDWARD SEARS,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis

The WITNESS: My name is Edward Sears, and I have resided in Deer Lodge, Montana, for nearly twenty years, during all of which time I have been Master Mechanic for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I recall a fire which occurred, I believe, on October 21, 1933. The fire started from some unknown origin and destroyed our main machine shop and all equipment. I had partial charge of clearing up the debris. Two or three days after the fire our superintendent came to Deer Lodge and wanted to know if some trucks could be procured to haul away debris. We looked

(Testimony of Edward Sears.)

around but were not successful in getting any, so finally I called up Mayor Marquette, of Deer Lodge, and asked him if he knew where we could get some trucks. He told me the city had a truck that we were welcome to use. We accepted his offer, and to the best of my memory the truck was delivered to the Milwaukee by Mr. Gilbert, the Fire Chief of the city of Deer Lodge. The truck was then turned over to Mr. McLeod, foreman of the B. & B. Department, who was to furnish a driver for the truck and place the truck in operation. The truck was then used for hauling away burnt timbers, dirt, bricks and whatever other accumulations there happened to be there. No machinery was hauled at that time, and at no time was any machinery hauled from the site of the fire by truck. The machinery was all moved on railroad cars, some, I think, going to Tacoma and some to Milwaukee. [98] It was the main machine shop that was destroyed by the fire. This building was not rebuilt, but a building sufficiently large to accommodate the machinery which we installed was added to the roundhouse, which is, I would say, about four or five hundred feet from where the machine shop originally stood. It was not possible to ship this machinery to Tacoma or Milwaukee, or wherever it might be shipped, without first removing the debris; or, in other words, in order to ship the machinery it was first necessary that the fire debris be cleared away. The first work the truck was used on was in clearing up the northwest cor-

(Testimony of Edward Sears.)

ner of the building to allow for the construction of a foundation to make repairs to the roundhouse. That is where Mr. McLeod's gang was working. This roundhouse is used for the maintenance and inspection of engines of the Milwaukee Railroad, which engines are used in interstate commerce. The Milwaukee Railroad originates in Chicago and has its terminus at Tacoma.

Q. The Milwaukee Railroad runs through the states of Minnesota, Dakota, Montana——

The COURT: I take it there is no contest about its being an interstate carrier?

Mr. MURPHY: No.

The COURT: That may be admitted?

Mr. MURPHY: Yes.

The WITNESS: When we started to clear away the debris it was our intention to ship the machinery to Milwaukee and Tacoma. Clifford Gilbert was engaged by us in the work of cleaning up. I saw him the day he was injured, and I noticed that his ring finger of the right hand was very badly mangled and that his little finger was lacerated and his hand covered with blood. Mr. Jones, my mechanical foreman, took him to the physician before I [99] was informed of the accident, and as soon as I learned of his being injured I went to the physician's office to see just what had happened. I then looked at the truck and noticed that several vanes of the fan were broken. While I could not testify that Ex-

(Testimony of Edward Sears.)

hibit 1 for identification is a part of that fan, it is very similar in material to the fan. The fan is made of cast aluminum. When I saw Clifford Gilbert at the doctor's office he was in considerable pain and I did not inquire of him the cause of the accident. I did not make an inspection of the truck at the time the Milwaukee Railroad secured it. Following the accident I inspected the truck and found several fan blades broken, and some of the broken blades had jammed the fan so that it could not rotate, and one of the four arms placed in front of the fan for protection was cracked. I would assume that one or more of the fan blades had broken and blocked the fan, causing the breaking of other blades. From its appearance I would think that Exhibit 1 for identification is a part of the fan.

Q. Then you didn't inspect the motor of the truck at any time prior to the accident?

A. Had no reason to.

The COURT: That answer will be stricken out as not responsive.

Q. You didn't, did you, Mr. Sears?

A. I did not.

The WITNESS: I did not direct anyone else to inspect the motor of the truck prior to the accident. When the truck was received I turned it over to Mr. McLeod, foreman of the B. & B. Department, and he furnished a driver. This was an old army truck. [100]

ELWIN DILDINE,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is Elwin Dildine. I have lived in Deer Lodge, Montana, for the past eighteen years. I am twenty-four years of age. I know Clifford Gilbert a little. Until I was laid off I was employed as an electrician's helper by the Milwaukee Railroad. Since being laid off I have been a service station attendant. I was riding on the truck with Clifford Gilbert the day he was injured. My job was to see that the debris did not fall off the truck. I do not remember the exact date of Mr. Gilbert's injury or even the month. It was in 1933. At the time Mr. Gilbert was injured the car had stopped but the engine was running. We had just taken a load to the dump and we were returning to the place where the machine shop of the Milwaukee Railroad had been before the fire, which is the same building to which Mr. Sears referred in his testimony. Where we were dumping the debris was a quarter or a half mile from the point where we were loading it onto the truck. On our return trip the engine was missing, and I believe Clifford wanted to find out what was causing it to miss and adjust it. By missing I mean that the combustion in some of the cylinders was not perfect. When the engine missed it would

(Testimony of Elwin Dildine.)

lose power and the truck would jerk. Mr. Gilbert did not tell me what he intended to do. He first did a little investigating. He was on the other side of the truck from me, but I presume he was opening those pet-cocks or seeing they were tight. He had to lift the hood to get at the motor. There are four pet-cocks on the motor, one on each cylinder. They are located somewhere close to the spark-plug, but I could not tell you their exact location. Towards the end [101] of the motor nearest the driver's seat there is a pet-cock. The fan was in the center of the radiator and could be seen from the driver's seat, as well as from the front end of the truck when the hood was raised. On the driver's side of the radiator there was a housing over the fan, but I did not notice whether there was a housing on the motor side. If I remember correctly, the housing consisted of a wire grill. I did not see the four strips that covered the fan on the motor side. It was the jerking and lack of power that first called our attention to the missing of the motor. The motor would overheat, but I was not on the truck enough to tell you how often it was necessary to fill the radiator. That was the first time I was ever on the truck. The first I knew that Mr. Gilbert was injured was when he hollered and started to run and asked me to turn off the motor. I turned off the motor at that time. I afterwards looked at the fan and noticed a number of broken blades and a number of pieces of metal down

(Testimony of Elwin Dildine.)

in the fan grill and down in the radiator. The pieces of metal I saw were similar to and of about the same thickness as Exhibit 1 for identification, which exhibit looks like a part of the fan. When Mr. Gilbert was injured he did not say anything other than what I have told you except to exclaim, in a sort of a prayerful way, "Jesus Christ." He had not had time yet to feel any pain, as when an accident like that occurs your hand gets numb. I did not see any blood. All I could see were two fingers and the glove torn away. I did not see him when he was taken away to the doctor's office. This accident occurred on the premises of the Milwaukee Railroad between ten and eleven o'clock in the morning. We commenced work that day at eight o'clock, and I think we had made three trips previous to this one. [102]

Cross-Examination by Mr. Garlington:

The WITNESS: When I looked at the fan after the accident I saw several pieces of the fan down in the bottom of the fan housing. When the accident occurred we had delivered the load of debris to the dump and we were returning to get another load when Clifford stopped the truck. The material we were hauling was just thrown on the dump as waste material.

Redirect Examination by Mr. Davis:

The WITNESS: The truck was an old truck.

C. L. STUBBS,

called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is C. L. Stubbs. I reside at 1601 Livingston Street. I have lived in Helena all my life, or for about forty years. For the past twenty odd years I have been employed as a machinist. I was first employed by the Northern Pacific for about eleven years. Later I worked for the city for about a year and for the Great Northern for six or eight months. I am now employed by Burgan & Walker, agents for Buick and Pontiac automobiles, as shop foreman in charge of repairs. I supervise the repairs of automobiles to the extent of an average of four or five hundred a month. At the present time I have three mechanics under me. I am familiar with automobile fans, and in my work as foreman I have had occasion to see the results of fans that have broken and disintegrated. I had occasion to see one last week.

Q. Supposing you had a car extremely old, shown to have a wobble in the fan, with worn bearings, that gave forth a loud hum as the fan revolved, and it was shown that the flanges or pieces [103] of that fan had broken off and had flown through the air while the shaft was revolving, and basing your answer on your experience in having cared for all the cars of which you have testified, what, in your opinion, would have caused that fan to break or come apart?

(Testimony of C. L. Stubbs.)

Mr. MURPHY: That is objected to, your Honor, for the reason that it is a supposititious question which includes elements which have not been developed in testimony here. I refer particularly to that element in which counsel describes pieces of the fan as being thrown through the air. For that reason it is not pertinent to anything so far developed in this case.

Mr. MAURY: The proof is that two or three pieces were found in the housing. Certainly they would be thrown a short distance in the air. And we have the proof that a piece was thrown out through one of these holes a distance of six or eight inches, and that it struck and took off a finger of this plaintiff and injured the little finger.

The COURT: I do not recall this proof.

Mr. MAURY: I do not think it is testified that the piece struck his finger. It might be a fair inference. I will assure the Court that we will connect this up.

The COURT: With the assurance that you will prove that fact the objection is overruled.

Mr. MURPHY: Note our exception.

The COURT: Let the record show that whenever an objection is made and overruled the party making it is granted an exception on the record without asking that the exception be noted. [104]

(REPORTER'S NOTE: Because of the immediately foregoing ruling of the Court all exceptions hereinafter noted by counsel will be purposely omitted from this transcript.)

(Testimony of C. L. Stubbs.)

Mr. MURPHY: That is further objected to for the reason that it is incapable of an answer, not being sufficiently definite in indicating to the witness what may have caused the fan to break, and as to whether or not it was an obstruction, centrifugal force, an explosion, as alleged, or otherwise.

The COURT: That is just what they are trying to find out. That is the purpose of the question. The objection is overruled.

A. As long as there was no obstruction and your bearing was badly worn, I would say it was an out-of-balance condition. Centrifugal force would tear that fan apart.

The WITNESS: If there was no great strain on the fan belt, that is, from play or from a frozen bearing or anything like that, and the belt was jamming the fan all the time. I would say it was caused from out-of-line.

Q. Supposing it were shown that the bearing was so worn that the fan had a play of approximately a quarter of an inch?

Mr. MURPHY: That is objected to as not being produced in the evidence.

The COURT: The objection is overruled.

A. Do I understand that is on the shaft itself or at the top of the fan blade?

Q. As it revolves on the shaft there was a play up to approximately a quarter of an inch. What would cause that, where, in the fan itself, the movement or the wobble would be to the extent [105] of approximately a quarter of an inch?

(Testimony of C. L. Stubbs.)

A. Wear in the bearings.

The WITNESS: The tendency of worn bearings would be to throw the fan off center and cause it to wobble.

Q. Now, Mr. Stubbs, basing your answer again upon your experience, what have you to say as to the safety of using a truck with a fan in the condition which has been described with a wobble to the extent of approximately a quarter of an inch, and with the fan belt breaking repeatedly, and with this hum and knock in the bearings on the drive shaft as the shaft revolved?

Mr. MURPHY: That is objected to, your Honor, for the reason that it is the direct question involved and is a question for the jury.

The COURT: The objection is sustained. That is the very question, gentlemen, that the jury is called upon to determine, as to whether that was a reasonably safe appliance.

The WITNESS: If a car were driven in the condition described one could look for trouble in cooling, and there might be a breakage of the fan itself.

Cross-Examination by Mr. Garlington:

The WITNESS: I have not seen the fan involved in this case and I know nothing of its condition, my testimony being based upon the statements and suppositions of counsel. The fan which I testified broke last week was a motor-car fan and was made of steel. It is not ordinarily the fact that a

(Testimony of C. L. Stubbs.)

fan blade is broken by reason of an obstruction. A fan would be more likely to break when revolving at a high speed than at a low speed. If the fan was revolving at 500 revolutions a minute the centrifugal force would be a given amount, and if revolving at 1,000 revolutions a [106] minute the centrifugal force would be greater, but I could not say what the ratio is between the speed of the fan and the centrifugal force exerted at that speed.

Redirect Examination by Mr. Davis:

The WITNESS: With a fan running 500 revolutions a minute or a thousand revolutions a minute and with the bearings smooth and in good condition the resistance would be at a minimum. With the bearings worn and the fan wobbling to the extent of approximately a quarter of an inch, the resistance would be greater. If a fan runs out of alignment and knocks somewhat it would indicate to me that the bearings are loose.

Q. What happened in the case of the steel fan to which Mr. Garlington directed your attention?

Mr. MURPHY: That is objected to——

The COURT: It was brought out on cross-examination by your co-counsel.

Mr. MURPHY: Well, I object to it as being entirely immaterial and having no probative force.

The COURT: That is probably true, but where it is brought out on cross-examination they have a right to inquire into the matter.

(Testimony of C. L. Stubbs.)

A. The fan blade broke off and drove it right through the hood.

The WITNESS: I had not seen that fan before the accident. As to the distance this steel fan was thrown when it broke, I can go only by what the owner of the car told me. He said it was thrown at least fifty feet in the air after passing through the radiator shell. [107]

CLIFFORD GILBERT,

the plaintiff, called as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination by Mr. Maury:

The WITNESS: I am twenty-two years of age. On October 30, 1933, I was working at Deer Lodge, Montana, for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, having been employed by Mr. Sears, the Master Mechanic for that company, and the same gentleman who testified in this case. I was employed to drive a truck. I forget whether I was working three days or three and a half days when I was injured. When I was injured I was engaged in trucking charred timbers, dirt, and a few brick to the dump. There was machinery mixed up in this debris, and we were hauling the debris away from the machinery. That morning about eleven o'clock the truck cylinders started to

(Testimony of Clifford Gilbert.)

misfire and the truck began to jerk and heat up and it did not pull as well, so I got out to see what was the matter. I raised the hood and adjusted the carbureter, and in looking over the motor I found the rear priming cup open. The priming cup is used to pour raw gasoline in as an aid to starting the motor. While I was adjusting this the fan, which was six or eight inches from my fingers, broke, cutting off my ring finger. The fan was revolving when it broke and a piece or pieces of the fan struck my fingers. It was not possible to make an adjustment such as I desired to make without the motor running. Exhibit 1 for identification is a piece of the fan, but whether it is a piece that struck me I do not know. I got this piece, Exhibit 1, from the bottom of the splash-pan of the truck about a month anyway, I would say, after the accident. Whether the truck had been used in the meantime I do not know. The truck is now at the Milwau- [108] kee Railroad shops.

Q. How long had you known that truck before the day you were hurt by the breaking of the fan?

Mr. MURPHY: That is objected to, your Honor, for the same reasons heretofore stated, that it is too remote and is not probative in this case. I renew this objection because this is a new witness and the plaintiff.

The COURT: The objection is overruled.

A. Well, about five or six years or more.

(Testimony of Clifford Gilbert.)

The WITNESS: The last time previous to the time the Milwaukee Railroad took the truck over that I had driven it was about six months, at which time I drove the truck for about ten days for Powell County. Someone had driven it for the Milwaukee Railroad before I started to drive it. My father, Mr. Gilbert, took the truck over to the Milwaukee Railroad at the time it was delivered to the railroad company. I had no expectation or suspicion that the fan might fly apart, and I had had no experience of any kind with a fan flying apart. I would say that at the time the fan broke it was traveling at a medium speed. Previous to the time of the accident I had had trouble with the fan belt breaking, and on the occasion of my using the truck approximately six months previous to the accident I had fixed the fan belt five or six times. When the fan was revolving it made a sort of a thumping sound. I never paid much attention to whether the fan was in alignment or not, but I know it wobbled, as I could see that and had seen it at various times when I had the hood up. When I say it wobbled I mean the bearings were worn and it was loose on the shaft. When I got hurt I looked for Mr. Sears, but I ran onto Mr. Jones, I believe, and he took me to the storeroom and bandaged my hand. On my ring finger the flesh was torn away and [109] the bone was broke off and the finger was hanging by the cord; and the flesh on the little finger was torn away for approximately two-thirds

(Testimony of Clifford Gilbert.)

of the length of the finger, or, I might say, scraped away from the bone. The little finger is permanently crooked and it is not possible for me to use the last joint of that finger. It has stayed in its present position since the date of the accident. I have very little strength in my little finger and it is of no use to me. Where the ring finger was removed is very tender to jarring or being struck. My right hand is in such a condition that when using a wrench I have a constant fear of its slipping and my hand being skinned, and when using a hammer the hammer rocks in my hand, and just as I might strike at something the hammer might rock back and forth and I would miss the object at which I was striking. I am right-handed, and there is nothing I do with my left hand in preference to my right. In using a two-handed tool I always place the right hand in front of the left. I find it embarrassing when I shake hands with strangers. Before this accident I was given to playing baseball and to bowling. This injury to my hand has affected the control of my ball in bowling, and in playing baseball I would be afraid to reach out to catch the ball.

Q. Do you know whether there are certain concerns or employers of labor that will not permit a man injured as you are to go into service?

Mr. MURPHY: That is objected to, your Honor, first because apparently the witness does not have any special knowledge in regard to that, and,

(Testimony of Clifford Gilbert.)

secondly, it is too remote. The whole question here is to what extent his capacity has been impaired.

The COURT: The objection is overruled. The inquiry [110] should be confined to his own personal experience in seeking employment.

A. Well, I couldn't say for sure.

The WITNESS: I sought employment at the Gerrish Motors in Deer Lodge since this accident, and my injury prevented my securing employment, the reason assigned being that it slowed up my work. I had previously been employed by the Gerrish Motors. I would not be permitted to serve the United States in war if I sought to enlist in either the Army or the Navy. Before my injury I was following the occupation of an automobile mechanic, and these injuries I received have interfered with my work as a mechanic. I received excellent medical treatment at the time I was injured, and the best was done for me that could be done. My ring finger and little finger of my right hand were normal previous to this accident, and there was no stiffness of my little finger. Since my injury I have no power in my little finger with which to grip tools.

Cross-Examination by Mr. Murphy

The WITNESS: I have now attained the age of twenty-two years. This accident occurred two years ago next month, or on October 30, 1933. Mr. Sears called me to this particular work on which I was some days later injured. I could not say if he told

(Testimony of Clifford Gilbert.)

me personally that I was to go to work or whether he sent word through Dr. Marquette, but I rode from town over to the shops with Mr. Sears himself. I went with my father when he delivered the truck to the Milwaukee Railroad, and between that time and the time I was engaged to drive the truck some other person was driving it. I could not say just how many days after the truck was delivered to the railroad company it was before I was called to take charge of it and operate it. I think it would be at least a week, though. [111] I went to work either on the 26th or 27th day of October, so I had worked at least three or three days and a half prior to the accident. I cannot say that I recall that at the time I was engaged to operate this truck that I was told by Mr. Sears or by Dr. Marquette on behalf of Mr. Sears that the Milwaukee Railroad was looking for an experienced person who was familiar with the truck to operate it. I heard no such statement, and I was not advised in any manner of that fact. I do not recall that it was communicated to me that I was wanted to drive the same truck that I had helped deliver to the railroad company. It was my mother who told me that my services were wanted, and I believe she told me that Dr. Marquette had so advised her; but I do not recall that my mother told me Dr. Marquette had advised her that the railroad company was looking for an experienced person who was familiar with the truck to operate it. During the three or four days pre-

(Testimony of Clifford Gilbert.)

vious to the accident that I was operating the truck I was engaged in the same work of taking debris, consisting of dirt and burnt timbers and rubbish of various kinds in the truck down to a place where it was dumped as waste, and that was the entire operation in which I was engaged. From time to time for a period of five or six years previous to this accident I had operated this same truck, but I was not its principal operator, as other persons, including my father, also drove it. I do not know if during the period of five or six years that I was from time to time operating this truck my father was doing the repair work on the truck and keeping it in condition. You will have to ask him about that. I did not assist him in this work, and I do not know whether he did any of that work or not. For the three or four days previous to the accident that I was operating the truck I did not find that it operated satisfactorily, for there was some- [112] thing wrong with it nearly all the time. It would boil and miss. On this particular trip on which the accident occurred I noticed some of the cylinders, or at least one of them, were missing, so I stopped the truck at a point about a hundred yards, approximately, from the point where I was to load the truck. I then got out of the truck and raised the hood. There is both a foot lever and a hand lever on the truck for the controlling of the flow of gas. On this occasion I was using the foot lever, and before leaving the truck I took my foot off that lever. The hand lever

(Testimony of Clifford Gilbert.)

was in a closed position at the time. However, the accelerator was in a position faster than an idling position, as the motor would not idle, so that at the time of the accident the motor was running above the idling speed. I do not recall of saying shortly after I was injured that I left the motor idling. I do not know the rated revolutions per minute of that motor, and I would have no idea of what they actually were at that time or whether they were four or five hundred or more or less. In an idling position the motor would run slower; and in the position I left the accelerator when I got out of the truck just before I was hurt the motor would be running at less than its rated revolutions. The radiator formed the dashboard of the truck, and from the driver's seat one could see the fan that was enclosed in the radiator and which revolved in a space or opening in the radiator. The fan operated by the revolving of a shaft or axle placed in the center of fins or blades, the fins or blades radiating from a central fixture. The fan was separated from the axle or shaft by a bearing of some kind, but I could not say whether these were ball-bearings or whether it was a brass bushing, or just what it was, as I never looked at the bearing. I would say the blades themselves, from the hub or axle to the tip of the blade, were each six or eight [113] inches long. I could not say how many blades were in the fan, but there were more than six. These blades are all integral with the hub or base or central point. I could

(Testimony of Clifford Gilbert.)

not say if the tips of the blades, at their circumference, were bound together by a piece of metal designed to hold them rigid. However, there is usually a metal band of some kind placed around the outside of such fans, connecting the tips of the blades all the way around and forming the circumference of the fan itself. I could not say that I noticed that when looking at the fan through the openings through which it could be seen, either looking from the motor side back toward the radiator and fan or from the seat of the cab forward toward the radiator and fan, that the tips of the fan blades and that band were not visible but were covered by a flange of a smaller circumference than the circumference of the band. I could not say that while driving the truck I paid much attention to the fan, so I do not know whether through that aperture I could see the band which was on the outer ends of the fins of the fan. Directly in front of the fan, on the engine side, are three cross members that are attached to the shell of the radiator, which radiator shell encloses the fan. I am not able to say whether the tips of the fan blades extend further into the radiator than these cross members. My first step in looking for the cause of the trouble the truck was experiencing just before the accident was to lift the hood of the engine, which raised from the front end and was supported by a brace adjustable for that purpose. On opening the hood I discovered that the number four pet-cock, which is the rear pet-cock or

(Testimony of Clifford Gilbert.)

the one nearest the radiator, was in an open position. This would have a tendency to cut down the compression and would interfere with the proper operation of that cylinder, as whatever went into the cylinder in [114] the form of gas could escape through that opening. I do not remember whether I opened the hood prior to that this same morning. I do not know how long I had been driving the truck that morning with this pet-cock open. I may have been driving it all morning in that condition, as I do not recall having previously lifted the hood that morning or of anyone else having lifted it. That open pet-cock might account for the cylinder missing, but it might also be heating and losing compression. The open pet-cock would, however, interfere with the smooth and orderly operation of that cylinder in conjunction with the other cylinders, and would account for some of the lack of smoothness and jerking. I do not remember whether I got the pet-cock closed or not. When I was preparing to close this pet-cock I was standing at the left-hand side of the motor looking toward the front of the truck, as the pet-cocks are on the left-hand side of the motor. I imagine the fenders of the truck are about three and a half feet high. From the outside moulding of the fender, where it is turned down, I would say it would be about two and a half feet to the pet-cock on the rear cylinder. There was no difficulty or strain in reaching over to manipulate that

(Testimony of Clifford Gilbert.)

particular pet-cock, and standing on the ground one would be able to reach it without losing one's balance or anything of that kind. I stood a little nearer to the tip of the fender than to the rear of it. I could not say if the tip of the fender is a little short of reaching to the front of the front wheel. This was not a cold morning. It may have been chilly to some people, but it was not chilly to me. When I began to manipulate the pet-cock or was about to manipulate it I had a glove on my right hand and I also had a ring on my finger. I could not say if after the accident the ring was embedded in my finger, or whether it was bent or [115] crushed so that it was difficult to take it off my finger. I cannot say that they attempted to take it off until they removed the finger. It was a metal ring of some kind, but I do not know just what it was. When I got the piece of metal identified as Exhibit 1 I did not pay any attention to the cross members which are directly in front of the fan, and I did not notice that the cross member to the left-hand side of the car, facing toward the front, was cracked, and I am not aware of its being cracked even up to the present time. About a month after the accident I saw the fan which was in the truck at the time of the accident. At the time I saw it it was in one of the shop buildings. The splash-pan of which I spoke is located near the bottom of the motor, and its purpose is to keep mud and water from splashing onto the motor. It is not under the motor, but is built on

(Testimony of Clifford Gilbert.)
the side of the motor about two-thirds of the way down. It does not extend under the motor at all. It keeps the water off the spark plugs and cylinders. I do not remember that I made any measurement of the distance from the fan blade to the pet-cock. In speaking of a distance of six or eight inches I am speaking just from my general recollection and familiarity with the truck. I spoke of a thumping noise in answer to questions put by my counsel, and not a humming noise. A humming noise would be natural. I also said there seemed to be a jerk or knock. This condition existed in the truck for the three or four days I drove it for the Milwaukee Railroad. I cannot say that I noticed this thumping noise some six months before. I know that six months before when I was driving it it was continuously breaking belts. The fan stops rotating when the belt breaks. The thumping noise was not at all noticeable at that time. I could not say whether the truck had been in service from the time I ceased driving it in [116] the spring of 1933 until it was turned over to the railroad company. So far as I know it had not been in service. I think it is a fact that my father and I are the two persons in Deer Lodge who knew most about this truck and were most familiar with it. After I was injured I made no further examination of the fan or the motor to see what had happened. After the accident I first went to the safety-first dress-

(Testimony of Clifford Gilbert.)

ing-room at the plant and had some preliminary treatment, and then Mr. Jones got his automobile and took me to the doctor's office, where the operation for the removal of my finger was performed. I have forgotten the name of the man who gave me the preliminary treatment at the dressing-room, but I believe it was Teddy Christiansen. I have no recollection of saying to either Mr. Christiansen or to Mr. Jones on that day and before I arrived at the doctor's office that I got my finger in the fan but did not know just how it occurred, nor do I recall of making substantially the same statement to the doctor at his office. Neither would I say that I made such a statement to Mr. Neumen, the Claim Agent for the railroad, several days after the accident. However, I would not say that I did not. I would not say that I did not make such a statement to Dr. Unmack, as the pain was so great I do not recall just what I said. I may have made such a statement to Dr. Unmack and to Mr. Jones. As to how the accident occurred, I reached for the pet-cock and I was turning it off when something hit my hand and injured it, but as to just what occurred I had not then and do not now have any definite knowledge. The gloves I was wearing at that time were kind of an orange color. The ring I had on was not a horseshoe nail that had been turned into the shape of a ring. It was a light metal ring, and was not gold or silver.

(Testimony of Clifford Gilbert.)

Q. On the 30th day of October, 1933, within an hour or two [117] after the accident to your hand, I will ask you whether in Dr. Unmack's office in the city of Deer Lodge, in the presence of Mr. Jones, one of the foremen at the work where you were employed, and Dr. Unmack, you did not say that you got your finger into the fan, or your hand into the fan, and that you didn't know how it occurred?

Mr. DAVIS: To which we object on the ground that it is repetition.

The COURT: The objection is overruled. This is evidently laying the ground for impeachment.

A. No.

Redirect Examination by Mr. Maury:

The WITNFSS: I recall definitely that I did not put my hand into the fan. I could not tell you into how many pieces the fan had broken when I saw it next after the accident. I would say about two thirds of the fan blades had pieces broken out of them. It was about a month after the accident that I examined the fan. When I went to Dr. Unmack's office I was in terrible pain. My finger was just hanging. I imagine the blades of the fan are about eight inches long. Between the pet-cock that I was reaching for and the blades of the fan were three small pieces of metal to which the shaft of the fan is fastened. I imagine these pieces of metal are ten to twelve inches long and an inch

(Testimony of Clifford Gilbert.)

and a half or two inches wide, and they were between where I was putting my hand and the revolving fan. One of the pieces ran up and down and the others crosswise, and they were all made into the casting of the radiator. The revolving fan was approximately two inches inside of those guards or coverings. The openings between those guards were eight or nine inches wide, I imagine. There is no possibility that I stuck my hand through those open- [118] ings and into the fan; and there was nothing in there that I had any purpose in reaching for.

Mr. MAURY: We offer in evidence this piece of metal, Exhibit 1 for identification.

Mr. MURPHY: We object to it as not being sufficiently identified.

The COURT: The testimony shows that it is not the identical piece——

Mr. MAURY: It is not the identical piece that struck, no. We do not claim that it is.

The COURT: It is similar, at least, to the material of which the fan is made, and I think it is admissible, although it is not definitely established that it is a piece broken from the fan.

Q. I will ask you if this is a piece of the fan that was in the Mack truck on the day that you were injured?

A. Yes.

The COURT: Do you wish to object to it now, Mr. Murphy?

(Testimony of Clifford Gilbert.)

Mr. MURPHY: I should like to ask one question in connection with that. When was that piece broken from the fan?

The WITNESS: At the time of the accident?

Mr. MURPHY: How do you know that? You found it thirty days later, did you not?

The WITNESS: Yes.

Mr. MURPHY: We object to it as not being properly identified.

The COURT: The objection is overruled.

(The piece of metal referred to was received in evi- [119] dence as Plaintiff's Exhibit 1.)

The WITNESS: When I was first hurt I knew that the fan had broken, but I did not know just what had happened to it, except that the pieces hit my finger.

Re-cross-Examination by Mr. Murphy:

The WITNESS: Nothing that I know of or can account for happened just before the fan broke.

Q. I have been advised by my associate that I perhaps made an error in putting the question with reference to Dr. Unmack's office by saying that it was in the presence not only of Dr. Unmack but of Mr. Jones. I should like, with the permission of the Court, to modify the question and to repeat it by asking if, at the time indicated in the previous question and in Dr. Unmack's office, and in his presence, you did not then say that you had got your finger into the fan, or your hand into the fan, and that you didn't know how it occurred?

A. No.

JAMES GILBERT,

recalled as a witness for the Plaintiff, testified as follows:

Direct Examination by Mr. Maury:

The WITNESS: I obtained the piece of metal, Exhibit 1, from the Mack truck over at the Milwaukee shops. It is in exactly the same condition now as it was when I obtained it. There were lots of other pieces there, but this was lying out on the splash-pan and I picked it up. It was about an hour and a half after the accident that I got Exhibit 1, as I went right over to where the truck was as soon as Clifford came back from the doctor's office. The other pieces of the fan that I saw were down in the [120] bottom of the fan pan.

Cross-Examination by Mr. Murphy:

The WITNESS: I obtained Exhibit 1 from the truck about an hour and a half after the accident.

Q. Am I mistaken in thinking that the witness Clifford Gilbert testified that he had procured it thirty days——

The COURT: We do not care for argument at this time. He is not in a position to tell you whether you are mistaken. He can tell you what he knows about it, but he cannot give you his opinion.

Mr. MURPHY: In view of my understanding of the testimony we renew our objection to the introduction in evidence of Exhibit 1.

The COURT: The renewed objection is overruled.

JOHN TRUSCOTT,

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Davis:

The WITNESS: My name is John Truscott, and I live at Deer Lodge, Montana. I am in attendance here as a member of this jury panel. You asked me some questions at luncheon about this case. I was passing through the Milwaukee yards shortly after the accident to Clifford Gilbert, and I saw his hand after it had been dressed. This was on the premises of the Milwaukee Railroad. I saw Clifford Gilbert leaving when he was taken away. I examined the fan after the accident, and I noticed that there were about six blades on the fan and that four of them were broken. While I would not say that the material in Exhibit 1 is exactly the same as the material in the fan, it looks very much like it. I [121] came here very reluctantly as a witness.

Cross-Examination by Mr. Murphy:

The WITNESS: I was not present at the time of the accident, but I saw Clifford Gilbert as he was leaving the scene of the accident. I was within one hundred feet of him at the time I first noticed him. I saw the condition of the fan, as the hood was still up and through the opening I could see the fan blades were broken. This was within a few minutes after the accident. I did not look down into the fan housing, so I did not observe any of

(Testimony of John Truscott.)
the broken pieces of the fan down in there. I saw one or two pieces on what would be called the splash-pan. Probably I was not closer to the fan than six feet. I just noticed the fan was broken and then went on. I did not notice that one of the cross members in front of the opening through which the fan stream flows was cracked.

Redirect Examination by Mr. Davis:

The WITNESS: By the splash-pan I mean the pan on the sides of the motor which prevents mud and water from being splashed from the road onto the motor, and it was in this splash-pan that I saw these pieces of metal. There may have been other pieces in the fan housing, but I did not observe them. I did not notice the pieces of metal on the splash-pan particularly, but I noticed they were pieces of this cast aluminum fan. One of them, I remember particularly, was a parallelogram, probably two inches each way, and the other was two inches by three and a half or four inches.

THE PLAINTIFF RESTED [122]

DEFENDANT'S CASE

EDWARD SEARS,

previously called and sworn as a witness for plaintiff, was called as a witness on behalf of the defendant and testified as follows:

(Testimony of Edward Sears.)

Direct Examination by Mr. Garlington:

THE WITNESS: My name is Edward Sears. I testified in this case on behalf of the plaintiff. I am Division Master Mechanic for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and I am located at Deer Lodge, Montana. After the fire at the Milwaukee shops, which occurred October 21, 1933, it was, of course, necessary to re-establish some of our work and clean up the debris caused by the fire. Mr. McLeod was there representing the Bridge and Building Department, and I represented the mechanical department. Mr. Jones is my mechanical superintendent, and he was taking care of mechanical repairs and supervising that part of the work. On the 30th day of October, 1933, Mr. Jones was in charge of the cleaning up operations. Mr. McCormick, representative of the locomotive department, was also there. I cannot tell you if Mr. McLeod was there representing the B. & B. Department on that day or not. Prior to that time I had obtained a Mack truck from the city of Deer Lodge. The superintendent was anxious to have this debris cleaned up as fast as possible, and he asked me about getting dump trucks. First we got in touch with some men who were doing some road building, but they were leaving and we could not get their trucks. Then I got in touch with the Mayor of Deer Lodge, and he offered us the use of the city truck, which was this Mack dump truck, and the truck was later delivered to the

(Testimony of Edward Sears.)

Milwaukee premises. When the truck was delivered to us Mr. McLeod, the foreman of the Bridge and Building Department, assigned a young man, Mr. Schurman, I believe, to [123] operate the truck. Mr. Schurman was a member of the bridge and building gang and an employee of the railroad company. I do not know how long he had been in the employ of the railroad or whether he had previously been working around the Deer Lodge railroad yards. Mr. Schurman began hauling debris from the northwest corner of the shop where we were reconstructing a portion of the roundhouse. No complaint was made to me concerning the condition of the Mack truck prior to October 30, 1933. Then I believe Mr. Schurman and the gang with which he was working were sent to some other point and another man was assigned by Mr. McLeod to drive the truck, but this other man did not seem to have the necessary ability to be a truck driver. Then I hunted up Dr. Marquette to learn if he could tell me of a man competent to drive the truck, and Dr. Marquette put me in touch with the plaintiff, Clifford Gilbert. The plaintiff may have ridden back to the plant with me, I am not sure, but in any event he was at the plant very shortly afterward, and he was placed under Mr. McLeod and on his payroll. On the morning of October 30, 1933, between nine and ten o'clock, I believe, I was over in the farther part of the grounds with Mr. McCormick when I was told there had been an accident

(Testimony of Edward Sears.)

to Mr. Gilbert. Mr. McCormick and I walked over towards the storeroom where the car was parked and observed the broken fan in the truck. Later on I went to the doctor's office to see how bad Mr. Gilbert's injuries were. Dr. Unmack and Gilbert were in the office, and I saw Gilbert there on the operating-table and observed his injured hand. His finger was very badly mangled and I cannot say whether I observed a ring on his finger or not. Then I returned to the plant, and later on Mr. Jones, Mr. McCormick and I jointly looked at the truck and noticed that several blades of the fan were broken and that [124] the fan was jammed, the broken blades of the fan having got between the outer edge of the other blades and the core of the radiator. I did not observe the fan belt. Since the 30th day of October, 1933, this truck has been stored at the Milwaukee shops in Deer Lodge. The broken parts were cleared from the fan housing and the truck was used for a short time, I do not remember just how long, after the accident with the broken fan in it. I cannot state positively, but I think it was Mr. Schurman who drove the truck after the accident. A new fan was ordered and when it arrived it was installed in the truck so that the truck could be returned to the city in the same condition it was when we got it. Mr. Hulben, a machinist, performed the work of installing the new fan and the work was supervised by Mr. Jones. Both these men are employees of the Milwaukee

(Testimony of Edward Sears.)

Railroad. I have no personal knowledge of what parts of the old fan and what parts of the new fan were used in the installation. I only know from what they told me.

Q. At any time after the injury did the plaintiff make any statement to you as to how this accident happened?

A. I believe it was on the following day that Mr. McCormick and I visited the young man at his home to see how he was getting along, and at that time we asked him if he had any idea how he got hurt. He told us he was closing this so-called priming cock and had his hand injured. He didn't seem to have any——

Mr. DAVIS: We object to that as the opinion of Mr. Sears.

Q. Yes. Just tell us what he said—what his words were.

A. He couldn't give us any——

The COURT: That is a conclusion. The question is what words did he say or use. Give us the words the [125] plaintiff used in your presence at that time and place.

The WITNESS: He didn't seem to know just how it happened.

Q. You can't repeat the words that he used?

A. I don't believe I could at this time; not under oath.

(At 4:55 p. m. o'clock of Friday, September 27, 1935, a recess was taken until the following

(Testimony of Edward Sears.)

morning, Saturday, September 28, 1935, at ten o'clock a. m.)

The WITNESS: I have seen Exhibit 2 for identification before. It is a part of the truck in question and was removed from the truck which is at the Milwaukee shops and brought here. It is in the same condition now that it was at the time of the accident with the exception that a new fan has been installed in it.

Q. Otherwise would you say that the entire exhibit is in the same condition?

Mr. MAURY: We can save time. Let it be introduced.

Mr. GARLINGTON: We will offer it in evidence.

The COURT: By consent of counsel and without objection Exhibit 2 is admitted in evidence.

(The exhibit, consisting of the complete radiator and fan assembly, was received in evidence as Defendant's Exhibit 2.)

The WITNESS: Exhibit 3 for identification is the fan that was in the radiator which is part of Exhibit 2 at the time of the accident. In other words, Exhibit 2, at the time of the accident, was in exactly the same condition as it is now with the exception that Exhibit 3 for identification was in it instead of the new fan.

Mr. GARLINGTON: We should like to offer in evidence Exhibit 3 for identification. [126]

Mr. MAURY: Along with the fan belt?

(Testimony of Edward Sears.)

Mr. GARLINGTON: We do not propose to introduce the fan belt, although it may be marked and identified.

Mr. MAURY: That is the old fan belt?

Mr. GARLINGTON: Yes, that was in there.

Mr. MAURY: Well, that should go in, I think, with the fan.

Mr. GARLINGTON: If the Court please, it is our position that the fan belt had no part in this controversy and it is not our desire to offer the fan belt.

Mr. MAURY: Well, it is our desire to get everything that the jury wants to see before the jury.

The COURT: Of course, I have no control over the practice followed by counsel in presenting his case. You would have a right to take up on cross-examination the matter of the fan belt and the rotor on which the fan apparently ran, and those can go in on cross-examination. Is there any objection to Exhibit 3?

Mr. MAURY: None whatever.

(The exhibit, being the damaged fan, was received in evidence without objection as Defendant's Exhibit 3.)

Mr. MURPHY (handing four photographs to Mr. Maury): We desire to say that these pictures have been taken but recently, but they are a fair representation of what they purport to show at the time of the accident.

Mr. MAURY: These may be introduced as fair representations of the old truck.

(Testimony of Edward Sears.)

The COURT: The photographs, four in number, are admitted in evidence by agreement of all parties expressed in open court as a fair representation of the automobile [127] involved in this case.

(The photographs were, without objection, received in evidence as Defendant's Exhibits 4, 5, 6, and 7.)

The WITNESS: I looked at the truck both before and after I went to the doctor's office on the day of the accident, although we made a more thorough examination on the second occasion. On inspecting the radiator and the fan I noticed that pieces were broken out of the fan blades and that there was a crack in the cross-arm which I will designate the right-hand cross-arm as you look at the truck from the front. At this point, which is approximately two inches from the extreme right of the right-hand cross-arm I saw a mark from a glove finger with a little fuzz at that point. It was sort of short fuzz that I would say was from a glove. Opposite the place where I saw the finger mark I saw these pieces broken out. It would be hard for me to say just what the color of this fuzz was, but it was, I believe, a brown color. All the broken pieces of the fan that I saw at that time were inside the fan housing, some of them being between the fan and the radiator coils, as the fan had been jammed by these broken pieces. The Milwaukee Railroad provides safety rules for its employees in each department.

(Testimony of Edward Sears.)

Q. I will ask you whether or not there were any rules in force governing the maintenance of way and structures department of the Milwaukee Railroad?

Mr. MAURY: We object, unless those rules were brought to the notice of this plaintiff.

Mr. MURPHY: It is not for the purpose of showing that there was a violation of the rule by the plaintiff in this case. We have no intention of that kind, because we have not pleaded he violated any rule or was guilty of [128] any negligence in that regard. The purpose of its introduction is to show that there was a rule and that there was a manner of giving notice to the defendant of defects and what should be done if defects were discovered or known.

Mr. MAURY: We object to it as not material to this case. The standard of conduct of ordinary persons is the standard here, and not what standard the railroad company might have erected for itself.

The COURT: May I ask whether the defendant's position is that this plaintiff was at that time engaged in railroad business?

Mr. MURPHY: He was an employee of the railroad.

The COURT: Engaged in the operation of a railroad?

Mr. MURPHY: He was not engaged in the operation of a railroad, but he was doing work incidental to the railroad work.

(Testimony of Edward Sears.)

The COURT: It appears to me that in view of the circumstances shown by this case—that the plaintiff was employed but four days prior to the injury complained of—the defendant should be required to show that the plaintiff had some notice or knowledge that rules were in effect as promulgated by the defendant, or that he had some knowledge of the specific rule upon which the defendant relies here.

Mr. MURPHY: May we reserve the right to make an offer of proof later?

The COURT: Yes; and you may submit authorities and I shall be glad to receive them.

The WITNESS: After the accident the broken parts of the fan [129] were cleared from the housing and the truck was used again. Later a new fan was installed so that the truck could be returned to the city when it called for it. The new fan as installed is not in Exhibit 2. To my recollection I had no conversation with the plaintiff as to the manner of the occurrence of his injury.

Cross-Examination by Mr. Maury:

The WITNESS: At the time I picked up the pieces broken from the fan belt I could not say whether I found the piece that is broken out of the fan blade on Exhibit 3, being the piece from the largest fracture on Exhibit 3. The pieces that I picked up were turned over by me to Mr. Neumen. Mr. Neumen is the Claim Agent for the Railroad Company.

(Testimony of Edward Sears.)

Mr. MAURY: Are those pieces that Mr. Sears found here at the courthouse now?

Mr. MURPHY: No, they are not.

Mr. MAURY: Where are they?

Mr. MURPHY: I don't know. We were not abe to bring them here.

The WITNESS: Those pieces were gathered up and placed in a large envelope, which was kept in the office of the Company at Deer Lodge for probably sixty days or such a matter, and then the pieces were given to Mr. Neumen, the claim agent; and, so far as I know, Mr. Neumen took the pieces away with him. I think this fan, Exhibit 3, is now in the same condition as when I first saw it, except that there was an outer ring on this side, the same as is on the new fan in Exhibit 2. The parts of that ring were given to Mr. Neumen in that same envelope. These blades on the fan are called vanes. One of these vanes on Exhibit 3 is broken entirely away: another one is broken almost entirely away. The dimensions of the pieces broken out of the other vanes are, [130] for this one, three and three quarters inches across and an inch down; for the next one. four and a quarter inches and about an inch and one sixteenth; the next one, three and a quarter inches and about an inch and one sixteenth; and the next one, three and three quarter inches and about an inch.

Q. Now, the next one?

A. That is where the ring was broken off here.

(Testimony of Edward Sears.)

Mr. MAURY: We move to strike out that answer.

The COURT: The motion is granted.

The WITNESS: The next one is one inch by five eighths; the next one is hard to estimate, but I would say seven inches, and the greatest depth is about three inches; and the last one is four and a half inches and about three inches, triangularly shaped. That metal is three sixteenths of an inch in thickness. This ring that was about the outside circumference of the blades was broken out in sections from between the vanes that are broken out. I imagine the weight of the fan before it was broken was about twenty pounds. It is aluminum. At the full speed of the engine I imagine that fan would run about six hundred revolutions a minute. The box or piece enclosing the fan is just the same as it was the first day we saw it after the accident. It has not been changed a bit, and except for the new fan it is now in the same condition that it was immediately after the accident. The fan revolves clockwise. So far as I know the belt was not off the fan after the accident.

Q. Is this the belt that was running that fan (showing the witness Exhibit 9 for identification)?

A. It is with the exception that we had to cut——

Mr. MURPHY: We object to this examination as not being proper cross-examination, and for the further rea- [131] son that there is no connection in this case with any action or condition of the belt

(Testimony of Edward Sears.)

and the injury claimed and the method or manner of the accident which is the subject of the lawsuit.

The COURT: The objection is overruled.

A (Continued) It is the same fan belt with the exception we had to cut it to get it off. You couldn't remove it otherwise.

The WITNESS: Except for being cut, the fan belt is in the same condition it was after the accident.

Mr. MAURY: We offer it in evidence.

Mr. MURPHY: We object to the offer for the reason that in the condition of the plaintiff's case it is apparent that no action of the belt and no condition of it in any manner connected with or contributed to the injury complained of.

The COURT: The objection is overruled.

(The fan belt was received in evidence as Plaintiff's Exhibit 9.)

The WITNESS: Having placed Exhibit 1 in place in the broken blade of the fan, Exhibit 3, into which it seems to fit, I would say that as nearly as any human being can state Exhibit 1 is a part of Exhibit 3.

The WITNESS: Our counsel asked me a question and I didn't answer it quite correctly.

The COURT: Just a moment. I think counsel will take care of the defendant's case.

Mr. MURPHY: In view of the witness's statement we should like to ask another question.

[132]

(Testimony of Edward Sears.)

Redirect Examination by Mr. Garlington:

Q. Earlier this morning I asked you whether or not you had had a conversation with the plaintiff with reference to the manner in which this injury occurred. I will ask you if that is the matter to which you refer as being a question which you did not fully understand or correctly answer?

Mr. DAVIS: We object to this on the ground that it is repetitious.

Mr. MURPHY: We simply want this witness to put himself right if he made any misstatement. The particular conversation was excluded by a ruling of the Court, and we, of course, accept that ruling and will not go into the question of the conversation or its purport.

The COURT: Will you refer to that testimony?

(The reporter read as follows:)

"Q. At any time after the injury did the plaintiff make any statement to you as to how this accident happened?

"A. I believe it was on the following day that Mr. McCormick and I visited the young man at his home to see how he was getting along, and at that time we asked him if he had any idea how he got hurt. He told us he was closing this so-called priming cock and had his hand injured. He didn't seem to have any——

"Mr. DAVIS: We object to that as the opinion of Mr. Sears.

"Q. Yes. Just tell us what he said—what his words were.

"A. He couldn't give us any——

(Testimony of Edward Sears.)

"The COURT: That is a conclusion. The question is what words did he say or use. Give us the words the plaintiff used in your presence at that time and place.

"The WITNESS: He didn't seem to know just how it happened. [133]

"Q. You can't repeat the words that he used?

"A. I don't believe I could at this time; not under oath."

The COURT: As I understand the position of counsel, you do not intend to develop this matter any further?

Mr. MURPHY: No; because the Court has already ruled upon it.

Mr. MAURY: We withdraw our objection.

Q. Just answer yes or no.

A. Repeat the question please.

(The reporter read as follows:)

"Q. Earlier this morning I asked you whether or not you had had a conversation with the plaintiff with reference to the manner in which this injury occurred. I will ask you if that is the matter to which you refer as being a question which you did not fully understand or correctly answer?"

A. Yes; I talked to him.

Q. Just a moment. Answer yes or no.

A. Yes.

(Testimony of Edward Sears.)

Examination by The Court:

Q. There is a matter I want to be clear on. As I recall it, you said that you gathered up all the broken parts of the fan, put them in an envelope and preserved them in the office of the defendant corporation for a period of sixty days and then delivered them intact to Mr. Neumen, the claim agent for the defendant corporation. Now, will you kindly tell me what the duties of Mr. Neumen were and are?

A. Mr. Neumen is our claim agent.

Q. Yes; but what are his duties?

A. His duties, in cases of injuries, is to investigate those cases as to the cause of the injury and to collect such informa- [134] tion as he can pertaining to the injury.

Q. And to gather, I assume, what evidence he can for presentation to the court?

A. Correct.

Q. As I recall it, you further stated that the broken parts of the fan cannot be produced here?

A. So Mr. Neumen advises.

E. A. McLEOD,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is E. A. McLeod, and I reside at Butte, Montana. I am chief carpenter for

(Testimony of E. A. McLeod.)

the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I know of a fire that occurred at the Milwaukee shops at Deer Lodge in October, 1933, and I was on the scene of the fire possibly two hours later. I immediately moved in two bridge crews, and with the aid of a couple of clam-shovels we started cleaning up and removing the debris from the fire. I do not know just when the truck was procured from the city of Deer Lodge. It was on the ground when we started to work there. We used it for hauling away scrap. I selected Albert Schurman, one of my gang, to operate the truck, as I found out that he had had experience at that kind of work and knew how to handle trucks. He also operates our motor-car on the railroad. In my judgment he was the best man available for the job. He operated the truck for three or three and a half days, or something like that, during which time it came and went regularly on its trips.

Q. Was any complaint made to you by Schurman—— [135]

Mr. MAURY: We object to that as not material.

The COURT: The objection is sustained.

The WITNESS: Then Mr. Schurman left and I picked another man, James Crosley, to operate the truck. He had operated small trucks, but he could not handle this truck satisfactorily and I was afraid he might hurt somebody, so I went to Mr. Sears and asked him if he could get me an experienced truck driver who could handle that

(Testimony of E. A. McLeod.)

particular truck. Then Mr. Sears sent Mr. Gilbert, the plaintiff, to me, and he drove the truck for me for about two days, or until our end of the work was finished. During the time he drove the truck for me the plaintiff made no complaint to me with reference to the truck. The truck came and went regularly on its trips and worked satisfactorily in the removing of the debris. I was in Butte on the morning that the plaintiff was injured.

Cross-Examination by Mr. Davis:

The WITNESS: I entered the employ of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company in 1909, and I am now head carpenter. My gang maintains all the bridges, buidings, culverts, water-tanks, stock-yards, and so forth. In the event of a fire and a necessity to reconstruct buildings and remove debris, our department would participate in that. When I heard of the fire I went to Deer Lodge as quickly as I possibly could, as it was the duty of my department to see the debris was cleaned up and out of the way, and that we made ready for our building work. It was the machine shop that was destroyed by the fire. This is the building in which repairs were made to the motors and engines. I could not give you the dimensions of the buildings. The roundhouse and machine shop were conducted in conjunction with each other, and it was in these buildings that the [136] engines, which probably could be called main-line engines, were repaired and maintained.

(Testimony of E. A. McLeod.)

Q. Would they be engines that transported passengers and materials and freight from state to state?

Mr. MURPHY: I think we shall object to this line of questioning as not being proper cross-examination.

The COURT: The objection is sustained.

The WITNESS: I believe there was some machinery in the buildings that burnt down.

Q. Did you rebuild those buildings?

Mr. MURPHY: We make the same objection, that it is not proper cross-examination; and it is a part of the plaintiff's case, which is concluded.

The COURT: I believe that is right. You can make the witness your own witness and inquire into those matters.

The WITNESS: Mr. Schurman was an experienced truck driver, and it was not because his work was not satisfactory that he was taken off the truck, but because his crew was moved to Bonner, about fifty miles west of Deer Lodge. After he left James Crosley was put on the job and drove the truck for possibly two hours. He did not handle the truck to suit me and I was afraid somebody might get hurt. He did not have any trouble with the engine. His trouble was in handling the truck. He told me he had had experience in driving small trucks, Fords, I believe. I did not want anybody to get hurt so I removed him from that particular job. He is still working

(Testimony of E. A. McLeod.)

for me. Then I told Mr. Sears I would have to have an experienced truck driver. There was nothing about this particular truck that caused me to ask for an experienced truck driver. I would have done the same thing with [137] any truck. After I talked with Mr. Sears the plaintiff was sent to me, and he drove the truck. I was not at Deer Lodge the day the plaintiff was injured.

J. O. JONES,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is J. O. Jones, and I reside at Deer Lodge, Montana. I am mechanical supervisor for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Deer Lodge. I was in Deer Lodge at the time of the fire that destroyed the Milwaukee shops. As a result of this fire it was necessary that the debris be cleaned up, and in this work I observed a Mack truck being used. The first man who drove this truck was Schurman, who was employed in the Bridge and Building Department under the supervision of Mr. McLeod. I think he drove the truck for three days. Then Mr. Schurman's crew left and another driver whose name, I believe, is Crosley was taken out of Mr. McLeod's gang to operate the truck. Crosley

(Testimony of J. O. Jones.)

was not satisfactory as an operator and Mr. McLeod asked Mr. Sears to get an experienced driver, as a result of which the plaintiff came to drive the truck. I think the plaintiff started to drive the truck on Saturday and was injured on Monday, so he drove the truck about two days and a half. I saw the truck coming and going while he was driving it. The day the plaintiff was hurt I was making my regular tour of inspection and I had just come out of the power-house when I saw Clifford Gilbert and Carl ZurMuehlen, and I was informed that Gilbert had been hurt. I told Mr. ZurMuehlen to give Mr. Gilbert first aid at the storehouse office and I would get my car to take [138] Gilbert to the doctor's office. I got my car and took Gilbert to the doctor's office. He and I were along in the car. I asked Gilbert how the accident happened, and he told me he was doing something with the priming-cocks and that somehow he got mixed up with the fan. He did not know just how the accident happened. I stayed at the doctor's office with Gilbert until the doctor came, and then I left him in the doctor's care and went back to the shop. When I got back I made a casual examination of the truck to see how the accident happened, but after the lunch period Mr. Sears and I made a joint examination of the truck. We examined the radiator, which is part of Exhibit 2, and also the fan, Exhibit 3, which, at that time, was in the radiator. On an inspection of the fan I

(Testimony of J. O. Jones.)
found a number of pieces broken out of the vanes. Some of these pieces were in the bottom of the race, while others were jammed in there. There were different size pieces, some of the pieces having been broken up into smaller pieces. Looking from the motor towards the radiator to the right side of the cross member, and about an inch and a half from the outside of the inside of the race, there was a crack which is now visible here on Exhibit 2 (the witness pointing to what he terms a crack); and on the bar there, about two inches toward the center from the crack, there was an indication of some fuzz, sort of light brownish in color. I do not know from what it had come off, but it was like something off a glove or piece of cloth. That is about all I observed. Immediately after the accident the pieces of fan were removed and the truck was used for a few days with the broken fan still in it. I think it was used for three days in that condition, and I think that Mr. Schurman drove it during that time. It was not used afterwards with the broken fan in it We ordered a new fan for the truck [139] immediately after the accident, and as soon as it came the shop force installed it under my supervision. Sam Hulben, a machinist, did the work.

Q. Will you tell the Court and jury just exactly what it was that was done?

A. When the new fan arrived the outer race or bushing, as you might call it——

(Testimony of J. O. Jones.)

Mr. MAURY: The exhibit agreed to as having been correct, we do not see the materiality of what they did.

The COURT: Not unless it develops the condition they found during the operation.

Mr. GARLINGTON: That is our contention.

A. (Continued) It was found on the arrival of the fan that the outer race or bushing, you might call it, wasn't exactly in accordance with this old shell. It was necessary then to shove the bushing out of the new fan, and we applied the——

The COURT: I do not think that is material. I will permit testimony with reference to the old fan, the housing, or bearing, or anything existing at the time of the accident; but it appears to me that the fact that they ordered the wrong fan would have no bearing on the situation.

Mr. GARLINGTON: It is our intention to develop the fact that all of the original bearings and parts of the old fan are still in this Exhibit 2, except for the blades of the new fan.

Mr. MAURY: We have admitted all that.

The COURT: In view of that I do not see any reason for the testimony. It encumbers the record.

Mr. GARLINGTON: Our purpose is to demonstrate that [140] with the original equipment in the exhibit, as it is now, the worn and defective condition which was testified to by the plaintiff's witnesses is not present.

Mr. MURPHY: Or, at least, to show what the condition is.

(Testimony of J. O. Jones.)

The COURT: You might ask him about that. You are asking him about installing the new fan. The Court's ruling is that you may show the condition of the old fan or the bearing or anything connected with it.

The WITNESS: In connection with the removal of the old fan and the installation of the new fan I had occasion to examine the various parts of the old fan, including the bushing or outer race of the roller-bearings, the roller-bearings, and the shaft.

Q. What was the condition of the shaft on which the old fan rotated?

Mr. MAURY: We object. The shaft itself is the best evidence.

The COURT: It is the best evidence if the average man would understand it. I do not know whether the jurors can, from an examination of a piece of steel, judge whether it is in good condition. He can testify to the parts as he observed them as an expert. It is merely a matter of opinion.

A. In my opinion they were good—in good shape, just as they are now.

The WITNESS: The ball-bearings and the outer race were in good shape. The only reason we did not use the outer race that came with the new fan is that it did not match up with the old ball-bearings. Each of those parts is now in Exhibit 2, and the new fan now in Exhibit 2 rotates upon those parts to which I have re- [141] ferred to. In my

(Testimony of J. O. Jones.)

opinion the rotation of the fan as it is in Exhibit 2, in its present condition, is identically the same as the rotation of the fan, Exhibit 3, in Exhibit 2 prior to the time Exhibit 2 was repaired. My reason for this opinion is that we merely pushed the new bushing out of the new fan and put the old one back in the same fit, which would practically make no difference on the inside bearing or race whatever. It is my opinion that the old fan, Exhibit 3, rotated on its shaft in the radiator in the same manner that the present fan now rotates, and that in so far as the shaft, the ball-bearings and the race are concerned, the wobble and end-play, if any, now in Exhibit 2 is just the same as it was when the old fan was a part of Exhibit 2, because, outside of changing the bearings, there is no adjustment to make. This one break in the vane of Exhibit 3 is a newer break than the others, and is what I would term a fresh break.

The COURT: Just take a red pencil and mark that place where he says the fresh break is.

(Counsel marked with red pencil the edges of the break near where the particular vane joins the hub.)

The WITNESS: I do not think the vane now marked by a red-pencil mark was broken at the time Exhibit 3 was removed from the truck and replaced by the new fan. The edges of these other breaks disclose oil and dirt on them, resulting from what we term as "age of a break." Some of that could

(Testimony of J. O. Jones.)

be caused by using the fan in the motor. This break marked with the red pencil does not disclose the same age as these other breaks. From my experience it would be my opinion that this fan was not used in the motor since the break in the vane marked with red pencil occurred. This truck, with the broken fan, Exhibit 3, in it, was used for [142] about three days after the accident. (The witness tests Exhibit 2 for wobble or end-play.) There is no lift and there is about one thirty-second of an inch end-play. It is necessary to have some end-play in order to keep it from running warm, and you could properly have very little less end-play than that. There is no wobble present. This same condition would be present if the fan were being operated in the motor. The wobble, when present, would naturally be controlled by the bearings, and the end-play is a matter of the space between the ends of the fan and its housing. Assuming that the frame were rigid, the wobble and the end-play would be controlled by the shaft, the bearings and the race.

Cross-Examination by Mr. Davis:

The WITNESS: We did a pretty good job of putting the new fan in. However, there was nothing to do except to put it back as it was. I think the play of one thirty-second of an inch makes it mechanically correct. I had not inspected or examined the fan as it ran in the truck prior to the accident to Mr. Gilbert. If a wobble were present

(Testimony of J. O. Jones.)

in such a fan, it is my opinion that such wobble would be caused by a worn shaft or worn bearings. It could have been possible, with lack of lubrication, that bearings that had run in this fan for twenty years might be worn. I could not say whether, if lubricated, the bearings would show any appreciable wear after fifteen years. When we rebuilt the fan we did not use the outer race that came with the new fan, nor did we use any new bearings. In other words, all the bearings that are now in Exhibit 2 are the same bearings that were in the old fan.

Q. Showing you Plaintiff's Exhibit 9, I will ask you if you know what that is? [143]

A. Yes, sir.

Q. What is it, Mr. Jones?

Mr. MURPHY: We object for the reason that it is not proper cross-examination; and this belt, we contend, has so far had no connection with the accident claimed and for which suit is brought.

The COURT: I think the fan belt has a connection with the fan and the condition of the motor at the time of the accident. The objection is overruled.

A. That is a fan belt.

The WITNESS: This fan belt was removed from the truck by Mr. Sears before we came over here. It is now in the same condition it was before being removed, except that it had to be cut in order to remove it. Those worn portions of the

(Testimony of J. O. Jones.)

fan belt were present when the belt was removed. They are due, as far as I can see, just from the fan being in service. This wearing would not, in this case, be due to a wobbling of the fan. A wobbling of the fan would probably cause a different kind of a wear. In my opinion the break in the vane marked by a red pencil is a newer break than the other breaks in Exhibit 3. Exhibit 3 was in the master mechanic's office for a time after the accident, and then it was turned over to Mr. Neumen, claim agent for the Milwaukee Railroad, who gathers evidence and in conjunction with the attorneys prepares cases for trial for the Milwaukee Railroad. This Exhibit 3 has not been out of the possession of the Milwaukee Railroad since the accident, that I know of. So far as I know none of these pieces were broken from the vanes of Exhibit 3 prior to the accident, although I did not inspect the fan before the accident. These pieces broken from Exhibit 3 were turned over to Mr. Neumen and kept by him some place. I do not know why [144] they are not now in court. When I took Clifford Gilbert to the doctor the ring was still on his finger. The break on Exhibit 3 which I have marked as A-1 I consider to be one of the first or oldest breaks. With the exception of a little piece that is newer than the rest, I consider the break which I have marked as A-2 to be another one of the oldest breaks. I also consider those breaks which I have marked as A-3 and A-4 to be others of

(Testimony of J. O. Jones.)

the oldest breaks. The break which I have marked as A-5 I consider to be a little newer than the other breaks. The break which I have marked A-6 I consider to be an old break. Those breaks which I have marked as A-7 and A-8 I consider to be newer breaks. Those that I have marked A-9 and A-10 appear to be newer breaks and of about the same age. I do not recollect whether the two cracks which appear in the outer circumference near the point which I have marked A-10 were present shortly after the accident. I have placed these breaks which I have marked into three divisions, designated respectively as old, new, and newer, because of their appearance. These breaks in time start to darken, and newer breaks show a brighter edge. It is my opinion that the breaks which I have designated as old breaks occurred at the time of the accident, and that those which I have designated as new or newer breaks occurred after the accident. I did not state to Mr. Garlington that this fan, Exhibit 3, was operating in the truck following the accident in the same condition as we now find it. It was operated after pieces were broken out of it, but some of those pieces that are now out of it were still intact. These tubes, which form the cooling part of the radiator, are in the same condition now that they were at the time of the accident. If I am not mistaken, there is a shield between these tubes and the vanes of the fan, but otherwise the vanes of the fan are [145] pretty

(Testimony of J. O. Jones.)

close to the tubes. The only pieces of the fan vanes that I saw were found in the fan housing. I did not see any pieces of the fan in the splash-pan. I would say I saw eight or ten pieces which, in my opinion, were broken from this fan. I do not know that anybody inspected this fan after the truck was placed in service and prior to the accident. At the time of my conversation with Clifford Gilbert following the accident, in which he said he did not know how the accident happened, his hand was badly mutilated, there was blood, and he was in pain.

CARL ZURMUEHLEN,

called as a witness for the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is Carl ZurMuehlen, and I reside at Deer Lodge, Montana. I am tool foreman for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Deer Lodge. I recall the conditions at the railroad shops in Deer Lodge following the fire of October, 1933. During the cleaning up operations I was straw-boss and had some men under me, and during the time of these clean-up operations I noticed Clifford Gilbert driving a truck back and forth. I recall when he was injured, and at that time I was probably 250 feet away from the place of accident. I am the first

(Testimony of Carl ZurMuehlen.)

aid man in the mechanical department of the Deer Lodge shops. Immediately after the accident one of the men came running over to me to tell me there was a man hurt. I immediately walked over towards where Gilbert was, and he was coming towards me. I think Mr. Dildine was with him. I met him just at about the edge of the machine shop, and just as I got there Mr. Jones came along. We saw that Gilbert's hand was badly hurt, and Mr. Jones told me [146] to take care of Gilbert and wrap him up and he would get a car. When I first saw Gilbert following the accident the finger of the glove on the fourth finger, or the finger that is cut off, was ripped off, and that part of the glove covering the fifth or little finger was badly torn, and the back of the glove was torn. One finger of the glove was missing. I would call the color of the glove a light brown. My first aid kit was burned up in the fire, and I knew they had one at the storeroom office, so I took Gilbert over there. First I got a pair of scissors and cut off his glove. Then I saw that he had a ring on his fourth finger and that that finger was badly mutilated. In fact, it was just hanging, with the skin, you might say, holding it on. The little finger was badly hurt, and I did not know if they would even save that. I immediately bandaged and wrapped his hand and threw some cotton around it and then some more bandages so he could be taken to the doctor. His hand was bleeding badly. I escorted Mr. Gilbert

(Testimony of Carl ZurMuehlen.)

from the storeroom office, and immediately Mr. Jones came. I turned Gilbert over to Mr. Jones, and I suppose he took him to the doctor. At any rate, they left in the car. I then went over to the Mack truck to examine it. I looked at the fan and saw that the vanes had been broken off and that the pieces were lying in the bottom of the case, between the fan and the coils of the radiator. I also noticed a crack in this cross member (indicating a cross member on Exhibit 2) about an inch and a half from the right end of the cross member. Around the shops we use white cotton gloves, smooth on the outside, but the glove Gilbert had on was just the opposite, smooth on the inside with fuzz probably one eighth or three sixteenths long on the outside, being sort of an imitation of fur but made of cotton; and right on top of this cross member, about two inches in towards the center of the [147] car, was fuzz off of the glove.

Cross-Examination by Mr. Maury:

The WITNESS: I have been working for the Milwaukee Railroad for more than twenty-four years. I am tool foreman. I have charge of all tools and repair of machinery, under Mr. Jones. This mark that you refer to as a scratch and which appears to me to be a piece of welding was on the other side of the motor when I examined the fan after the accident, and I did not see it. I was on the left-hand side of the motor, and this was on the other side, so I could not see it. I think that

(Testimony of Carl ZurMuehlen.)

Exhibit 2 is now in exactly the same condition it was immediately after the accident, except that a new fan has been installed. I do not know what became of the radiator cap. I am sure I had nothing to do with it. I did not look to see if the radiator cap was on when I examined the fan. I do not know if new parts of the fan were put in on the old bearings, as I have nothing to do with that end of the mechanical work. Naturally when I saw Gilbert after the accident the blood was dripping from his hand. It was probably a minute or a minute and a half after Gilbert was injured that I first saw him. I am a machinist.

Q. Can you tell us on this Exhibit 3 how many different edges there are to the breaks in the vanes?

Mr. GARLINGTON: If the Court please, we object to this as improper cross-examination. We did not go into all of the details and the condition.

The COURT: You examined him with reference to this fan.

Mr. GARLINGTON: We examined him with reference to what he saw immediately after the accident.

The COURT: And he referred to the fan and also to [148] the radiator, did he not?

Mr. GARLINGTON: Yes.

The COURT: The objection is overruled.

A. I would say there is two.

The WITNESS: I would say that the break in this vane into which Exhibit 1 apparently fits is a

(Testimony of Carl ZurMuehlen.)

new break. When I saw this fan after the accident it was, of course, encased, and while I noticed there were a number of broken vanes, I did not count them. I tried to turn the fan but it would not turn. I could not tell you if this new break into which Exhibit 1 seems to fit was present at that time or not. All I can say is that this break has been made since the other breaks occurred. This fresh break may have been made ten days or six months after the other breaks. I could not say how long after it was made. I did not assist in making an inspection of the truck. I looked at the fan just for my own satisfaction. I cannot tell you why it is that I noticed and remember about the fuzz on the cross member of Exhibit 2 but do not recall if this fresh break was in the fan at that time. Gilbert had on a cheap ring of some sort. There was blood on it, and that is the reason I cannot describe it in detail. His finger was badly lacerated and looked as though it had been pulled. No one told me to say that. I have had about twenty years experience in first aid work.

Q. Did you use any Mercurochrome or any disinfectant or antiseptic on the wound?

A. We have orders from the doctor, in our instructions——

Q. Answer my question.

A. No, sir, I did not.

Q. You simply wrapped it up?

A. Yes, sir. [149]

(Testimony of Carl Zur Muehlen.)

The COURT: The witness has a right to explain the answer, if he wishes to.

The WITNESS: We have instructions where we take first aid that where we send a patient immediately to the doctor we are not to touch or put anything on the wound.

The WITNESS: I did not accompany Mr. Gilbert to the doctor. Mr. Jones went with him. I find on measuring that the distance between the point where I saw a mark on Exhibit 2 and the vane of the fane as it revolved is three quarters of an inch. The diameter of Exhibit 3 is seventeen and three quarter inches, and the diameter of the opening in Exhibit 2 through which the fan is visible is fourteen and a half inches, so one and five eighths inches of the fan would be back of this shell surrounding the opening in Exhibit 2. The length of the notch marked on Exhibit 3 in red pencil as AX is an inch and one eighth.

ALBERT SCHURMAN,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is Albert Schurman, and I reside at Missoula, Montana. At the present time I am employed as a B. & B. carpenter for the Milwaukee Railroad, and I was employed by Mr. E. A. McLeod. I have had about ten years ex-

(Testimony of Albert Schurman.)

perience as an automobile mechanic, although I was not continuously employed as an automobile mechanic during that period. In Iowa I worked in a garage for a little over a year, and since I have come here I work on cars each winter during the layoff for different people. During the summers I work in the bridge crew for the Milwaukee Railroad, but I am not employed by the railroad in the winter. [150] I have driven automobiles since I was twelve years old, and I am now thirty-four years of age. I drove trucks back east for about a year, and I have had occasion to drive trucks since I have been employed by the Milwaukee Railroad. Immediately following the fire at the Milwaukee shops in Deer Lodge I was employed there as the driver of a Mack truck, the one involved in this case. I was working under Mr. E. A. McLeod, the gentleman who has testified in this case. This truck was delivered at the power-house in the morning and Mr. McLeod asked me to drive it. I operated the truck there for about three days. After I made the first trip with the truck I made an inspection of it, because the motor was getting warm and I looked at the fan belt to see whether it was slipping. I also inspected the fan and looked over such other parts of the motor as I could without taking the motor down. From my inspection I found that the fan assembly of the truck was in good order. I examined the fan for wobble and found just a very slight end-play. By that I mean the fan would

(Testimony of Albert Schurman.)

move slightly from one end of the shaft to the other. I would judge the end-play was about one eighth of an inch. I also looked at the magneto and the wiring and found them o. k. I did not find anything defective or dangerous about the truck, and I continued to drive it for the three days. The motor would heat up and the radiator leaked, and I had quite a time starting the motor when I would first start the truck mornings. Once in a while I had trouble with the motor missing. This would be after the motor had been idling for some time, and then when you would step on it the motor would miss. Then I would step on the gas and leave it there a minute, and the truck would start right off. The priming cups, which are for the purpose of priming the motor on a cold day so it will start easier, were all plugged up. The [151] truck also has a choke on it the same as any other car. When a priming cup is left open with the motor running it makes a hissing noise and it tends to cut down the power on that cylinder.

Q. I will ask you what your duty was with reference to reporting any defects or dangers that you might have discovered by your inspection?

A. Well, we have a book of rules, and there is rules in there governing that work.

Q. What are you supposed to do?

Mr. DAVIS: The book itself is the best evidence: and unless this plaintiff had some knowledge of what the rules were, I do not see how it would apply to him in any sense.

(Testimony of Albert Schurman.)

The COURT: Would you be able to show that the plaintiff had any knowledge that there were such rules in force?

Mr. GARLINGTON: No, sir; that is not our purpose.

The COURT: What is the purpose?

Mr. GARLINGTON: The purpose is to show the circumstances and the conditions under which this truck was received by the Milwaukee road and operated by it during the period when it is alleged that the defendant was negligent in failing to inspect it and take care of it properly. In connection with the proof of notice to it of the particular defect which is relied upon, we deem it important and material to show all of the circumstances which were present.

The COURT: A rule is not a circumstance. The objection is sustained.

Mr. MURPHY: I have prepared an offer of proof.

"OFFER OF PROOF

"Defendant offers to prove by defendant's witness Schurman [152] that the defendant operated under certain promulgated safety rules for its employees, and that at the time the truck was received by the defendant from the city of Deer Lodge one of said rules provided:

" 'Don't use tools, appliances or machinery, unless they are in a safe condition

(Testimony of Albert Schurman.)

for the work intended, and unless you are familiar with their use.'

"That when Albert Schurman was assigned to operate said truck one of the conditions of his employment and one of the circumstances under which said truck was operated was that any unsafe condition of the truck for the work intended should result in his ceasing to use it and reporting it to his superiors."

Mr. MAURY: We object to this as not material, not relevant as proving or tending to prove anything in this case, as a self-serving declaration, and as not having been brought home to the plaintiff in any way by notice or knowledge.

The COURT: In view of counsel's statement that the rule was not brought to the attention of the plaintiff in this case, and the further fact that he was only in the employ of the defendant corporation, as shown by the testimony of the defendant, for a period of two and a half days, the objection is sustained. Mr. Murphy, I will ask if you have any authorities?

Mr. MURPHY: No, your Honor, I have not; and I want to say frankly that I have no firm opinion that the plaintiff in this case could be bound by a rule of which he had no knowledge if his failure to have knowledge was due to any omission of the railroad company in not calling it to his attention. However, purely as a matter of precau- [153] tion, we desire to introduce the rules. I think

(Testimony of Albert Schurman.)

this proof is competent upon the question of the negligence of the defendant as to what its system was with reference to defective apparatus, tools, or appliances.

The COURT: The objection is sustained. Proceed.

The WITNESS: My inspection of the motor and fan of the truck was as complete as could be made without taking the motor down. In my ten years' experience as an automobile mechanic I have never heard of a fan exploding from centrifugal force. I am familiar with the operation of Mack trucks. They are a low speed truck and they have no governor on them. For a fan of the size and weight of Exhibit 3, before it was damaged, to explode from centrifugal force it would have to be revolving at a very high speed. The speed at which the fan rotated in this Mack truck would not be sufficient to cause it to explode from centrifugal force. My opinion is that some obstruction to the fan while it was in operation caused it to break. About three weeks after the accident, and when I returned to Deer Lodge, I had occasion to again drive this truck. I inspected the truck at that time and found the blades of the fan broken. I did not make a careful examination, but just sufficient to see if the truck was safe to run. There was no wobble in the fan at that time, and there was no more end-play than was present when I had driven the truck previously.

(Testimony of Albert Schurman.)

Cross-Examination by Mr. Davis:

The WITNESS: I am quite familiar with Mack trucks. I have driven several different ones, but I could not say exactly how many. I drove a truck in Iowa, during part of which time I was working for the state. In Iowa I drove both a Mack truck and an International truck. Then I drove the Mack truck involved in [154] this case. Since then I have not driven any truck. I examined this truck when I first drove it and found it to be o. k. I found that the radiator leaked and that the engine missed. I found an end-play in the fan of about one eighth of an inch. I did not measure this. The end-play could have been less than an eighth of an inch, but it could not have been more than that. This fan belt, Exhibit 9, looks like the same fan belt that was on the truck. I noticed where the belt had been pieced and riveted. I also noticed where the edges of the belt had become worn. They all do that. I still want the jury to think that the truck was o k. There was nothing wrong with it, and it ran all right. I would say that this truck is about a 1915 model and that it is at least twenty years old. I had trouble starting this truck in the mornings, and I usually got the other truck to drag it around a little ways. We used to pull it from the power-house to the end of the roundhouse, a distance, I would judge, of about a half a block. One day I had to drag it further than that in order to start it. On that day we first pulled it up on the

(Testimony of Albert Schurman.)

hill and then pulled it down. However, it was not in gear when it was pulled up the hill. The distance the truck was pulled down the hill was about a block, and then it started. I tried to crank the truck on a cold morning, but you could not start it that way. The priming cups were plugged up and I cleaned them out. When we would drive the truck around it would boil. I did not know the radiator was filled with an anti-freeze solution. I just kept putting water in the radiator, and I used to fill it about every trip. The round-trip would be, I should judge, about two blocks and a half. However, the motor was never shut off, but was running all the time. The truck did not have a tendency to jerk, because I would not start the pull until the engine [155] started to work properly. I would hold it open a few minutes and until it started hitting on all four cylinders. I did not take the fan or any part of the engine apart when I inspected the truck, nor did I inspect the fan belt by taking it off. I did not take apart Exhibit 3 to see if any of the vanes had been broken. When I first drove the truck I did not notice if any of those vanes were broken. When I drove the truck three weeks later the fan, so far as I know, was in exactly the same condition that it is now.

Q. You still think the fan is o. k.?

A. It wasn't really o. k., but I watched it. I kept my eye on it all the time so——

Q. So you wouldn't have your hands cut off?

A. Yes.

(Testimony of Albert Schurman.)

The WITNESS: I was not present when the new parts for the fan arrived. I stated that in order for the fan to explode it would have to be revolving at a high rate of speed, and I gave it as my opinion that the breaking of the fan was caused from some obstruction. I believe it would be possible for the ring finger of an ordinary man's hand to obstruct this fan sufficiently to cause it to break in the manner it appears to be broken, because if one or two vanes were broken out the pieces would fall to the bottom and cause others to break; and I believe that a boy's hand would be a sufficient obstruction to break the vanes of this fan, the vanes being three eighths of an inch in thickness and constructed of cast aluminum. The only way in which I can figure this fan was broken is as the result of some obstruction. I have never seen a fan explode. I have seen them when they had broken, and usually with the result that they went through the radiator. I heard the testimony of Mr. Stubbs to the effect that [156] a fan had disintegrated and that a piece of it had been thrown through the hood of the car for a distance of fifty feet. This might have happened, I believe, with a steel fan. If a fan weighing twenty pounds attained a speed of one thousand revolutions a minute, it would have quite a little force. Going at a speed such as that I think it possible that an obstruction of the fan by the ring finger of a boy would be sufficient to break the fan. I would say

(Testimony of Albert Schurman.)

that the vane marked a-4 is the vane that broke first. I think aluminum such as this is easy to break. I used to be in the junk business and I have broken lots of it.

Q. Let me see you break this piece with these two pliers (counsel handing to the witness the piece Exhibit 1 and two pliers).

Mr. MURPHY: If the Court please, we object to the demonstration for the reason that it is not to be made under the circumstances counsel has inquired about, it in one case being a revolving fan and in the other a piece of metal three by four inches, or something of that size; and it would not demonstrate, I am sure, whether a revolving fan would break or whether it would not, but seems to me to be entirely non-probative of what might develop under the conditions so far developed in this case. I object to it as being of no probative value in this case and as being entirely immaterial.

The COURT: I do not like to have the exhibit broken, but I will overrule the objection.

A. This would be different than the pressure of that. I will tell you why: that is travelling and this is standing still.

(The witness thereupon broke into two pieces Exhibit 1.) [157]

The WITNESS: I did not say that this boy's finger was the cause of this breaking of the fan. I said it was some obstruction.

(Testimony of Albert Schurman.)

The COURT: Before we proceed any further I should like to have the reporter mark that portion of Exhibit 1 that has been broken from it.

(The piece broken from Exhibit 1 was marked by the reporter as Exhibit 1-A.)

The WITNESS: I am six feet and one inch tall, and I weigh about 173 pounds.

S. W. HULBEN,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Garlington:

The WITNESS: My name is S. W. Hulben, and I reside at Deer Lodge, Montana, where I have been employed for approximately twenty-two years as a machinist for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I am doing general machinist work, which involves the repairing of various mechanical devices. I am familiar with Exhibits 2 and 3. I first saw them about thirty days after the accident, at which time Exhibit 2 was in its proper position on the truck and Exhibit 3 was in its proper position inside of Exhibit 2. My reason for seeing these exhibits at that time was that I had been assigned by my foreman, Mr. Jones, to remove the broken fan and apply the new one which the company then had. This installation was made by me, and the fan which is now

(Testimony of S. W. Hulben.)

a part of Exhibit 2 is the new fan which I installed. In removing the old, broken fan, Exhibit 3, and in applying the new fan I found that the bushing or outside race that was then in [158] the new fan was different from the kind that would be needed in there in order to apply it. I examined Exhibit 3 before it was removed from Exhibit 2, because a mechanic will naturally want to know if anything is going to be needed for the correcting of the bearings and one thing or another, and before taking out a thing of that nature you will check it over to see if it needs any corrections. I examined Exhibit 3 in place for wobble, but I found none, or at least not enough to cause any correction to be made, as the fan rotated freely and perfectly on its axis, to my knowledge. There was no excessive end-play; that is, there was not sufficient end-play to warrant correcting that condition. There has to be some end-play, for otherwise the fan would not rotate. If the fan were tight it could not rotate, or if it did rotate it would run hot. One sixteenth of an inch would not be an excessive end-play and would permit the fan to run all right. In the fan as assembled and that I removed were the cast aluminum piece to which are attached the vanes, and inside the fan the sleeve or race which is a pressed-in, tempered steel piece, and in that the ball-bearings which rotate on an axle which in this case was a bolt. This axle is sustained by the cross members on Exhibit 2, the axle rotating

(Testimony of S. W. Hulben.)

on the center cross member, the axle on this side protruding approximately an inch from the center of the cross members. It protrudes in a similar manner on the other side, the only difference being that on this side there is a grease-cup through which to inject lubrication into the fan. When the radiator and fan are in place on the truck, this part of Exhibit 2 which is covered with a mesh faces toward the driver and is just ahead of his knees or feet. The axle of this fan is a piece of steel, threaded on one end for a nut, and it has shoulders on the inside to take care of the ball-bearings. [159] There is also a shoulder on the outside that comes up against these cross members on this side, and you have a head that comes up against the cross members on the other side, which makes that really a stationary part of the body of the fan. When I examined the axle of the fan it was, in my opinion, in good condition and showed no wear at all. If there is any wear it can be detected by turning the fan over. I also examined the ball-bearings of the fan and found them to be in first-class condition, there being no flat spots or anything defective about them. These ball-bearings are in there to take care of the play and the lateral, and they govern the fan as to wobble. A wobble could be present because of the fan being out of balance or because of worn bearings. Those are the main causes that I can now think of. The race or sleeve in the old fan was just as good as new.

(Testimony of S. W. Hulben.)

I reassembled the fan and installed it as it is now in Exhibit 2. The parts that were in the old fan, Exhibit 3, were pressed out and put in this new fan that is now in Exhibit 2; and, these parts are now in the new fan exactly the same as they were in the old fan. So, inasmuch as there has been no change in the bearings, the end-play in the new fan is exactly the same as it was in the old fan, and any wobble that might be present in the new fan is exactly the same as it was in the old fan. The end-play now present in the new fan is not excessive. The new fan as now installed as a part of Exhibit 2 has nothing wrong with it, and in my opinion there is nothing about the assembly of that fan that is defective or dangerous. The conditions in reference to end-play and wobbling now present in the new fan are identical with the conditions present in the old fan at the time I was assigned to take the old fan out and before it was removed. I was asked to make some measurements on the Mack [160] truck. I made these measurements and I have the figures with me. This picture, Exhibit 7, is a correct picture of the truck. The height of the left fender above the ground is forty-two and one half inches. The distance from the extended plane of the outside edge of the left fender directly horizontally to the fourth pet-cock on the motor is thirty-eight inches. The height of the pet-cock from the ground is four feet and eight inches. The fresh break on the vane of Exhibit 3 which is marked with red

(Testimony of S. W. Hulben.)
pencil and which is further marked a-7 was not present at the time I removed Exhibit 3. This piece has apparently been taken out since then.

Cross-Examination by Mr. Maury:

The WITNESS: I did not say that Exhibit 3 has been much broken since it was taken out of the truck. I stated that one piece was probably broken out since. When I removed Exhibit 3 I turned it over to Mr. Jones, my foreman, who carried it away. At the time I turned it over to him this piece that was broken out of the vane marked with red pencil was not broken out. The fan was never used again after it was removed. I have no way of knowing how this piece was later broken from the fan. I am sure the fan is now in a changed condition from what it was when it was removed. That is the only piece that is out now that was not out of the fan when it was removed. I see no difference in the discoloration of these other breaks. Some of them may have a little stronger discoloration than others, but they appear to me to be the same. This vane which is completely gone from Exhibit 3 was missing when I removed the fan, as was the one next to it that is nearly completely gone. I had nothing to do with the removing of the rim. In clearing the fan so it could be used again, the rim was removed by somebody, and it was not in [161] place when I removed the fan. It was removed, I would say, a few days after the accident and before the truck was again

(Testimony of S. W. Hulben.)

used. When the truck was used after the accident Exhibit 3 was in the truck, and, except for the jagged chunk marked a-7 that is now out of one of the vanes of Exhibit 3, the fan was in the same condition that it now is. The truck was used with the fan in that condition for a few days, but I could not state for just how many. I did not find any pieces of the fan in the bottom of the housing, as somebody had removed them all before I was assigned to the work of removing the fan. I installed only one new part, and that was the fan itself. I did all the work of removing the old fan and installing the new one. No one else did any of this work. The sleeve that was in the old fan was placed in the new fan, and the sleeve that came from the factory with the new fan was not used. Exhibit 10 is the sleeve that came with the new fan and that was not used. The fan is the same size as the old fan, but the parts in connection with the race were not interchangeable. The old sleeve is the same size as the new sleeve so far as the outside circumference is concerned. The inside is different. This sleeve is a press-in fit and will not fall into place, but you can see it will fit in place if you drive it in with a hammer, using a piece of brass so as not to mar the end.

Mr. MAURY: I will offer this sleeve in evidence.

Mr. MURPHY: We have no objection.

The COURT: The exhibit is admitted in evidence without objection.

(The sleeve was received in evidence as Plaintiff's Exhibit 10.)

(Testimony of S. W. Hulben.)

The WITNESS: The fan and this sleeve were the only new parts [162] received. That is why it was necessary for us to use the old bearings in installing the new fan. In changing the fan it was necessary to take out the sleeve of the old fan, and, after removing the bushing that was in the new fan, placing the old bushing in the new fan. A bushing is a hollow member which acts as a bearing on which something rotates. In removing the bushing from the old fan I used a press that is in the shop and that is made for that kind of work, and in which water causes a piston to come down and remove the bushing. The shaft is this center feature, and it was removed by taking off the nut and pulling the shaft out. That is loose, and it was not necessary to use the press in removing it. We did not have a new assembly, but simply placed the new fan in there with the old assembly. I do not know whether a new assembly would fit or not, because I never saw it. I never at any time saw any part of the other rim that went around this fan, Exhibit 3, and I do not know where it went to, as I was not around when it was removed.

JAMES O'NEILL,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: My name is James O'Neill, and I reside at Butte, Montana, where I am employed

(Testimony of James O'Neill.)

as shop foreman for the C. & F. Teaming and Trucking Company. I am a mechanic and have been such for twenty years. In my present employment I have to do with the repair and upkeep of trucks, and the work is all on heavy trucks; and, in this connection, I have under my care, for repair and upkeep, Mack trucks. In other occupations I have also had considerable to do with Mack trucks. I recognize the type of fan [163] that Exhibit 3 is. It is the type fan used in the AC Mack truck, better known as a "Bulldog Mack." I am generally familiar with that type of Mack truck. I have looked at Exhibits 2 and 3 in Helena prior to coming into court and within the last two or three days. This type of Mack truck is an old model, and I had 350 of those trucks under my charge at Coblenz, Germany, during the World War. I had full charge of this fleet of trucks and of their upkeep and repair. Exhibit 3 is a fan and is the type of fan used in the old type of Mack truck, but not in the late type. In a fan of this type which is not damaged there should be a ring or band which encircles and joins the tips or outer ends of the vanes, such as the band that is now on one side of this fan, encircling the tips of the vanes on each side of the fan. The fan which is now in Exhibit 2 has such a circular band on both sides of the fan. The engine in the Bulldog type Mack truck will turn over at six hundred revolutions a minute at a governor speed of fourteen miles an hour, at which speed the governor is set at the factory. If

(Testimony of James O'Neill.)

set properly, the idling speed of the motor is between 150 and 200 revolutions a minute. What the number of revolutions a minute would be at a medium speed would depend upon what was considered a medium speed, and they would be somewhere between 150 and 200 revolutions a minute and 600 revolutions a minute. The fan would revolve to the right as you look at it from the front of the truck, or clockwise. In order for the pieces to be broken out of the fan Exhibit 3, I would say that the fan would have had to strike something. I am familiar with centrifugal force. It is the force at which an object is rotating or spinning. A part of a wheel or fan that was spinning could let go and fly. However, with this type of fan, and assuming that the engine was revolving at a [164] speed of something less than six hundred revolutions a minute, I do not see how this fan could fly apart; and, in my opinion, the centrifugal force exerted by such a fan at that speed could not take out those pieces. Exhibit 3 is constructed of a composition of aluminum. If the centrifugal force were sufficient to cause a fan revolving in a housing such as Exhibit 3 was in to fly apart and cause numerous pieces to come out of it, it is my opinion that part of the fan thrown by centrifugal force would come through the coils of the radiator. I am acquainted with the location of the motor and of the pet-cocks on this type of truck, and the relative positions of the fan and radiator and motor when assembled

(Testimony of James O'Neill.)

and in place. The radiator is to the back of the motor and is between the motor and the driver. The photograph marked Exhibit 5 shows the location of the pet-cocks and particularly of the pet-cock nearest the radiator, and their position as shown by the photograph corresponds with my knowledge of their location in this type of truck. The pet-cock on the cylinder nearest to the radiator is approximately in line with the shaft or axle supporting the fan. Assuming that the driver of a truck of this type is making an adjustment by opening or closing the pet-cock nearest the radiator, and that the fan which is revolving in the radiator shell becomes broken and pieces are thrown as they would be by centrifugal force, and keeping in mind the location of the motor and its parts, it is my opinion that a part of the fan could not be thrown out between the cross members on the radiator shell and strike the fingers of the driver of the truck who had his thumb and first and second fingers on the pet-cock. Of course, nothing is impossible, but it does not seem likely that this could happen. I made an examination of the horizontal cross member on Exhibit 2 and observed that the [165] cross member is cracked. Standing at the front of the truck and looking back over the motor, this crack would be to the right-hand side. It is right here (indicating a point on Exhibit 2).

Q. Now, Mr. O'Neill, it appears in evidence here that the driver of this truck on a certain day nearly

(Testimony of James O'Neill.)

two years ago was manipulating or handling in some fashion the number four petcock. His testimony discloses that on the third finger of his right hand, or the one nearest to the little finger, he had a ring of metal. Without assuming as to what actually happened, let me ask you, if this finger with the ring became lodged in between the cross member at about the point where you observe the crack and the blade of the fan, whether or not, in your opinion, such a happening would or would not cause the breaking out of these pieces of the vanes to which I called your attention earlier?

Mr. DAVIS: To which we object on the ground and for the reason that it is calling for the conclusion of the witness, and no proper foundation has been laid. It has not been shown whether it is a soft ring or a hard ring, or what kind of metal it is, and it is purely speculative on the part of Mr. O'Neill.

The COURT: Is there any testimony showing of what metal the ring was made?

Mr. MURPHY: Nothing except that it was a metal ring.

Examination by the Court:

Q. Would it make any difference, Mr. O'Neill?

A. No, it wouldn't. Metal is metal, your Honor, as I see it.

Q. The resistance would not make any difference in the situation?

A. Not unless it was something like solder or pewter. If it [166] was pewter, of course, it would make a difference.

(Testimony of James O'Neill.)

The COURT: I do not think there is anything in the record showing what the composition of the ring was.

Mr. MURPHY: As I recall, plaintiff's evidence was that it was a metal ring, but neither gold nor silver.

The COURT: Yes. And in view of the statement of the witness that the answer would have to depend somewhat upon the composition of the ring, I will have to sustain the objection at this time. You can call the plaintiff and find out of what it was made.

Mr. MAURY: We will withdraw our objection.

A. Well, in my opinion, anything rotating hitting metal that is hard enough, it will break it with very little force. That is the experience I have had.

Direct Examination by Mr. Murphy (Continued):

The WITNESS: If those blades were rotating and came in contact with a ring enclosing a man's finger, which ring was of a composition sufficiently hard, the blades would be broken. Aluminum is more readily broken than iron or steel.

Cross-Examination by Mr. Maury:

The WITNESS: The motor at maximum speed revolves six hundred revolutions a minute. The fan is stepped up from the motor and revolves possibly a quarter again as fast, or probably eight hundred revolutions a minute. That is approximate. I do not know whether there was a governor on that fan

(Testimony of James O'Neill.)

or anything about the truck, as I never saw it. Neither do I know if it is one of the 350 trucks that I had in my charge in Germany. I stated that this type of truck had a governed speed of fourteen miles an hour. I could not state positively the number of revolutions a minute the fan would be going at that speed. I stated about eight hun-[167]dred, but that is just a guess on my part. I have taken the motor speed on that type of truck, and there is a way of figuring the speed of the fan, but I have never figured that. I just stated eight hundred revolutions as being roughly a quarter more than six hundred. One hundred and fifty would be exactly a quarter more. I do not know if this particular truck had a governor on it, but even without a governor the motor could not develop a speed of over eight or nine hundred revolutions a minute. The faster your motor goes the faster the fan revolves. When I speak of a speed of fourteen miles an hour, I am speaking of the speed of the truck and not of the fan. With the motor going nine hundred revolutions a minute, the fan would be going probably a thousand or a thousand and fifty revolutions a minute. I have not the ability to figure how many miles at that speed the outside perimeter of the fan would be travelling an hour. The outside diameter of the fan, I find on measuring it, is seventeen and a quarter inches, or perhaps if it were right down flat it might measure seventeen and three eighths.

(Testimony of James O'Neill.)

Multiplying the diameter by 3.14159 to find the circumference, the result, as close as one needs to figure, is fifty-four inches, or four and one half feet, which, multiplied by eight hundred revolutions a minute, would be 3,600 feet a minute. If that would be fifty-one or fifty-two miles an hour that the perimeter of the fan was travelling, it would make a difference in my calculations and in my opinion. If the fan flew apart, the pieces would have a tendency to go in the same plane or parallel plane of the revolution. One piece might hit another piece and drive it out of the housing or enclosing case. The fingers are softer than the metal in this fan. If the fingers got into the fan something would have to happen, but whether it would take the fingers off or not [168] I do not know. I have never known of this particular type of fan flying apart. I have known of other fans without the rim and with blades of mild steel that have crystallized to fly apart. You can tell by looking at steel when it is crystallized, but there is not a great deal of crystallization takes place in aluminum, although there is some.

Q. Calling your attention to Exhibit 1, don't you, Mr. O'Neill, see evidences of crystallization in that?

Mr. MURPHY: That is objected to for the reason that the piece is introduced in evidence as being one that has broken off from the fan which has been subjected to the force of the blow or whatever

(Testimony of James O'Neill.)

it was that broke it; and, therefore, whether crystallization is now present is of no pertinency, and we object to it for that reason.

The COURT: The objection is overruled.

A. Well, Mr. Maury, that particular thing looks to me as though something had rubbed by it.

The WITNESS: Down in the little cavity in that same piece that may be crystallization that is present and it may not.

Redirect Examination by Mr. Murphy:

The WITNESS: On this particular type of Mack truck the cooling system was never correct, and that particular type of truck always heated. On this particular type of fan the placing of an outside rim on the vanes of the fan tends to strengthen the fan.

GEORGE SHUE,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy: [169]

The WITNESS: My name is George Shue, and I reside at Butte, Montana. I am assistant professor of physics at the Montana School of mines and the acting head of the department. I have received a scientific education and training, and I have received degrees indicating that fact. I hold the de-

(Testimony of George Shue.)

gree of chemical engineer and the degree of master of science, with a major in metallurgy. On September 10, 1935, I completed at the University of Southern California all my work for a doctor's degree. This degree has not yet been received.

Q. Have you any information as to whether or not that degree has been conferred?

Mr. MAURY: We will admit that he is now a doctor.

The WITNESS: I have had several courses in metallurgy, two in particular of which were in metallography, one being a lecture course three times a week, and the other being a laboratory course six hours a week. These studies are designed particularly to give one a knowledge of the composition and action of metals. Some days ago, at your request, I looked at a Mack truck, and I particularly examined the fan installed in the truck and the fan which has since been introduced in evidence in this case as Exhibit 3. I also examined Exhibits 2 and 3 again yesterday here in the courtroom. I have also been in court during the giving of the testimony in this case. It appears that the break on Exhibit 3, which is marked by a red pencil mark, was made since the other breaks on Exhibit 3 were made.

Q. Now, it appears in evidence here that Exhibit 3, which you have just looked at, was used after the 30th day of October, 1933, on which day

(Testimony of George Shue.)

it was damaged and pieces broken out of it, at least three days or maybe more, and in that use performed the function of a fan in this Exhibit 2 and the truck to which it [170] was attached. Having that in mind and again directing your attention to the break which you have designated as a fresh break and which is marked with red pencil, would you say that that break was present in that piece of metal and exposed during the time the truck was used?

Mr. DAVIS: To which we object on the ground that no proper foundation has been laid. It calls for the speculation of this witness. There is no evidence whether he saw the truck before or whether he saw it afterwards within a day or two, and it calls for a pure opinion as to whether or not he thought the thing would be different than it is if it were used.

The COURT: Everything he has testified to is a matter of opinion.

Mr. DAVIS: We make the further objection that it invades the province of the jury.

Examination by the Court:

Q. Have you made any special study, Doctor, that would qualify you to answer that question? In other words, have you observed in actual operation the use of such a truck?

A. No, I don't believe I have.

The COURT: The objection is sustained.

(Testimony of George Shue.)

Direct Examination by Mr. Murphy (Continued):

The WITNESS: I am familiar with the metal of which Exhibit 3 is composed. That is an alloy cast aluminum, which consists almost entirely of aluminum. There are a few other materials in it. The vanes in Exhibit 3 appear to be approximately three sixteenths of an inch in thickness. Aluminum is much softer and much more brittle than steel.

Q. Do you know the number of revolutions a minute such metal [171] would stand before breaking or flying off by centrifugal force?

Mr. MAURY: We object to that as being impossible for any person to answer, as it would depend on the radius, and without the radius being given, no one could answer it.

The COURT: In the present form the question is objectionable, and the objection is sustained.

The WITNESS: The tensile strength of the metal of which Exhibit 3 is composed would probably be greater than ten thousand pounds to the square inch.

Q. Could you reduce that in any proper scientific manner to the revolutions a minute which Exhibit 3 would stand; that is, that the metal in Exhibit 3 would stand?

The COURT: Is that a matter of metallurgy.

The WITNESS: It is a matter of physics.

A. You mean this fan since it has been broken?

Q. No; in its whole condition. I do not mean that particular fan, but that type of fan.

(Testimony of George Shue.)

A. Well, a fan of that type would probably stand rotating at a speed in excess of twelve thousand revolutions a minute before there would be danger of its flying apart.

Q. From centrifugal force?

A. From centrifugal force.

The WITNESS: As between a sharp or sudden pressure exerted against a piece of metal and a slow, continuing and increasing pressure, that force depends upon the suddenness or quickness with which the object it strikes is stopped. The quicker you stop an object the greater the force exerted.

Q. Directing your attention to Exhibit 3 and particularly to those vanes which have lost portions near the top or front as I [172] hold it towards you, of a somewhat general semicircular nature, I will ask you to state whether those pieces could be broken out of this fan when revolving by striking some obstruction, which striking would be near the front of the fan as you look at it.

A. I think that is the way they were broken out.

Q. Well, will you answer my question?

Mr. DAVIS: We will ask that the answer be stricken out as not responsive.

The COURT: The motion is denied.

A. They could.

The WITNESS: Assuming that the plaintiff in this case, on the 30th day of October, 1933, was manipulating or adjusting a pet-cock which is

(Testimony of George Shue.)

known as the number four pet-cock on the rear cylinder or the cylinder nearest to the fan on the truck that he was driving, and that on his hand he wore a metal ring and a glove, and that the ring finger, which was the third finger of the hand, got in between the cross member and the path of the fan, and that the blades of the fan and particularly the ones to which my attention has been directed may have struck the finger and the ring, I believe those breaks in Exhibit 3 to which you have just called my attention could have resulted therefrom. From an examination of Exhibit 3 I am able to state the order in which the breaks in this fan occurred. Thinking of this fan first as an unbroken fan with a ring to the front of it such as the ring at the back, if while the fan were rotating some foreign object were thrust in between the cross member and these vanes, this foreign object would cause these breaks, because the ring out here would still tend to support these vanes and not let them break away back. Four of them show that type of break, and it would appear that they were all broken in that manner. [173] It would be purely speculative as to how the rest of them were broken, because with these pieces freed the others may have been broken by binding on these pieces somewhere within the radiator. This fan was rotating clockwise, and the order of the breaks to which I have referred, using the markings now upon the vanes, is as follows: a-4, a-3, a-2, and

(Testimony of George Shue.)

a-1. It is my opinion that the pieces broken out from the vanes and designated as a-4, a-3, a-2, and a-1, in that form and shape, could not be thrown out of the vanes by centrifugal force. Assuming as correct the evidence that the motor of this truck when up to full speed would make nine or ten hundred revolutions a minute, and that the fan connected to the motor was stepped up so that it would revolve one fourth or one third more times a minute than the motor, it is my opinion that such a speed could not cause this fan to fly apart by centrifugal force.

(At five o'clock p. m., Friday, September 28, 1935, a recess was taken until the following Monday morning, September 30, 1935, at ten o'clock a. m.)

Cross-Examination by Mr. Davis:

The WITNESS: I stated on direct examination that this aluminum fan would stand a resistance to centrifugal force to an extent of at least twelve thousand revolutions a minute, and possibly more. How much more it would stand is rather difficult to say, because we cannot tell exactly the strength of a material, and those calculations are based on the minimum observed tensile strength of cast aluminum. This is based on a tensile strength of ten thousand pounds to the square inch, or approximately that. The formula, of course, was not worked out for a fan of exactly those dimensions and of that shape, but the formula is worked on a basis of a

(Testimony of George Shue.)

thing which is approximately the same dimensions and [174] of perhaps a little simpler shape, and it also did not involve these outside rings. Those rings would probably tend to make it a little stronger than where the vanes were sticking out with no support at their ends. The formula used is a very common one for circular motion and for computing the force acting on a body moving in a circle; and this was merely applied in computing the force that would be exerted on one of those vanes to tear it out of the piece. The basic formula is a mathematical formula for the expression of Newton's Laws of Motion. It was stated by Newton during the seventeenth century. The data which I used for ascertaining the tensile strength of aluminum were in a handbook which was published about five years ago. Of course, those data were taken at some previous time, the exact date of which I do not know. It was about 1907 that aluminum was first commercially produced, as prior to that time the cost of producing metallic aluminum was excessive because of the fact that the cost of extracting it from its ores was excessive. The processes of alloying aluminum today are different than they were twenty years ago, the processes then not being as good as they are today. As to the effect of the annealing process on cast aluminum, when the material is cast it does not cool equally and the result of that is to set up internal strains within the cast because of this unequal cooling with its resulting unequal con-

(Testimony of George Shue.)

tract of the parts, and this annealing relieves those strains and makes the piece more uniform. The annealing of duralumin is done in some kind of a furnace, and is always accomplished in a much shorter time than two or three years. It is a matter of only hours or days. If aluminum is properly annealed it is better after the annealing than before.

Q. Supposing aluminum were subjected to a heat of say 350 [175] degrees centigrade, what would happen to it?

A. I have forgotten the melting point of aluminum, but I think it is considerably in excess of that, so such a temperature might be the proper annealing temperature for certain elements.

Q. Don't you know as a matter of fact, Doctor, that a heat of 350 degrees centigrade would practically destroy the aluminum?

A. It would some alloys.

The WITNESS: Three hundred and fifty degrees centigrade would be six hundred and fifty degrees Fahrenheit. The tempering heat for aluminum would not be as high as that for steel, and if aluminum were subjected to a heat as high as the tempering heat for steel it might melt the aluminum. I do not think room temperature would have much effect on aluminum. An aluminum rod would probably have two or three times the tensile strength, or perhaps more, of a hickory stick of the same size. Figuring the diameter of the fan roughly at eighteen

(Testimony of George Shue.)

inches, and if I have not made a mistake in my hurried calculations, I find that with the fan revolving at twelve thousand revolutions a minute the perimeter or circumference of the fan would be travelling at the rate of something like six hundred miles an hour. The slide-rule shows 620 miles an hour. I do not know whether that fan revolved that fast or not, but a fan of that material should stand that speed without danger of breaking.

Q. You base your calculation upon its being in perfect condition and not having been subjected to crystallization? Is that correct, Doctor?

A. What do you mean by crystallization?

Q. Please tell me what crystallization is.

A. Well, crystallization is an orderly arrangement of the [176] molecules of the material. In the case of metals they are crystalline, the molecules orderly arranged in crystal groups; and all metals are crystallized.

The WITNESS: It is possible for one of the crystals or molecules to sort of absorb others or cause them to grow into a solid mass. That takes place. I do not know as I know the exact cause of that, but vibration or shaking might have something to do with it, or heating it to perhaps 350 degrees centigrade might cause it. I think the fastest automobile has travelled about three hundred miles an hour. I think the fastest aeroplane has travelled at about the same speed, except that perhaps it has

(Testimony of George Shue.)

travelled up to four hundred miles an hour or a little more for a short time. The wings of aeroplanes sometimes come off. Most aeroplane wings are built of aluminum or like metal alloys. The application of too much force, in my opinion, would cause those aluminum alloy wings to break off. That force might be centrifugal force. I believe the frame structure of dirigible balloons is of aluminum or other like metal alloys. I have heard of them breaking, and that would also come from the application of too much force at some point. However, in that case I do not think the force could be centrifugal force. I never heard of a dirigible travelling three hundred miles an hour. I have heard of the old-fashioned grindstone flying apart, and this was probably due to centrifugal force. I believe, too, that circular steel saws have been known to fly apart, and the cause of that would, in my opinion, be centrifugal force. Circular saws are made of steel. Structural steel has a tensile strength of something like fifty or sixty thousand pounds to the square inch, or, in other words, it has five or six times the tensile strength of aluminum. Tool steel has probably from five to fifteen times the tensile [177] strength of aluminum. I do not remember of the incident when one morning your father and five other men were on a cage at the West Colusa Mine and the cage was dragged up to the top, and that suddenly the fly-wheel in the top of the sheave flew apart and these men were dragged into the sheave, and that one man was

(Testimony of George Shue.)

thrown out and struck against a wire and went down two thousand feet to his death, and I do not know what caused that fly-wheel to fly apart. Neither do I remember the occasion of the fly-wheel at the Moonlight Mine flying apart, when chunks of steel weighing from ten to fifteen pounds flew a city block. I have never seen a fly-wheel on an automobile fly apart, but I heard of one flying apart. The cause of that might have been centrifugal force, if it were in a weakened condition. A fan might become weakened if the vanes became bent and were straightened or if in some other manner something had happened to the fan to cause it to become weakened. I do not think the fact that the fan was within six or seven inches of the engine of the truck and that the engine had become overheated many times over a period of twenty years would have any effect on the fan. Excessive heat would weaken it, and vibrating and shaking would have its effect. If the fan were revolving at from six to eight hundred revolutions a minute and were running out of its periphery, there would be a small amount of vibration which might have a tendency to weaken the fan. If it were on an old-fashioned dead-ax. wagon which was hauling huge loads over very rough places, it might have a weakening effect on it. I recognize the following statement from the Encyclopaedia Britannica as a correct statement: "Form and Structure.—Aluminum when cast from

(Testimony of George Shue.)
the furnaces solidifies in crystal masses, as may be seen if an ingot be broken at temperatures just below the melting point. [178] Mechanical working deforms and partly shatters the original crystals, but subsequent heating causes recrystallization. When the degree of deformation and temperature of heating are suitable, some crystal grains grow at the expense of others and, under carefully selected conditions, one grain alone may grow and thus convert large pieces of metal into a single crystal. Exaggerated grain size such as this is avoided in practice, metal showing this phenomenon being defective in mechanical properties." While this particular encyclopaedia was published in 1932, I believe that conclusion had been reached prior to that time. While I do not remember the exact temperatures, I believe the following statement from the same encyclopaedia is true: "At high temperatures aluminum is very weak, whilst after being heated for a few hours to 350° C. work hardness is permanently lost." I also agree with this statement from the same work: "Aluminum ranks as a soft metal, its hardness being about one half that of copper and zinc but double that of tin." I do not know the tensile strength of the bone in the ring finger of a human being. Assuming that the fan had nine vanes and was travelling at the rate of six hundred revolutions a minute, a finger in there for that length of time would be struck nine times six hundred, or fifty-

(Testimony of George Shue.)

four hundred blows. I would have to have some information before I could say whether a human finger could have broken out the vanes of this fan, because it depends on how the blow was struck. If the conditions were right, I believe it could. I do not believe that a human finger could have caused the crack in the cross member on Exhibit 3, nor do I believe a human finger, by being caught between the fan vanes and the cross member on Exhibit 2, could have caused that crack. There is a space between the cross member and the fan vanes of [179] five eighths of an inch, and I do not believe that if a human finger had been caught in there it would have taken it off like a piece of cheese, because in that wide a space the cross member and the blades of the fan would not make a very satisfactory shears. It would have a great tendency to cause the finger to bend or break. Hoisting cables, when they lose their elasticity, sometimes pull in two. Considering that the fan is working within that radiator, where it is not subjected to very high temperatures, I do not think the fact that the fan had been operating for a period of from ten to twenty years would be a great factor in connection with the disintegration of the fan. I do not think an ordinary ten-penny nail could have made that crack on the right cross member. If the fan, travelling at six hundred revolutions a minute, had flown apart the pieces would, no doubt, fly with considerable force, and would tend to continue in a straight line in the

(Testimony of George Shue.)

direction in which they were moving at the instant they were let loose. If they should strike something it is possible that they would be ricochetted and deflected from a straight line. There are a number of places within the interior of the shell of the radiator where the tubes are bent as if they had been struck by some object. I was present in court the other day when Mr. Schurman, with the aid of two pliers and his leg, broke Exhibit 1-A away from Exhibit 1. It took some force to do that. My estimate of the dimensions of Exhibit 1 are merely an approximation, but in the hurried calculation I have made I would estimate that the probable tensile strength exerted at the point of maximum curvature in attempting to bend a thing like that would be in excess of five thousand pounds to the square inch. That would be a minimum. In other words, with the aid of two pliers and using his leg as a fulcrum, Mr. Schurman was able to [180] apply a pressure of at least five thousand pounds to the square inch. If it broke with a pressure of five thousand pounds to the square inch, then its tensile strength would be half of what it would be if it had a tensile strength of ten thousand pounds to the square inch. However, I estimated for a minimum tensile strength of five thousand pounds, and the tensile strength might still be ten thousand pounds to the square inch. It is safe to assume that if the truck was in use for twenty

(Testimony of George Shue.)

years and was subjected to vibrating and shaking and to overheating on numerous occasions that it is possible the material may have lost some of its tensile strength. When hoisting cables lose their elasticity I presume they are ranked as unsafe and are no longer used.

Redirect Examination by Mr. Murphy:

The WITNESS: I was asked to estimate the speed per mile at which a point at the perimeter of a fan of the dimensions given me by counsel would be moving under an axle speed of twelve thousand revolutions a minute, and I have stated that it would be roughly in the neighborhood of six hundred miles an hour. If the motor were at an idling speed the miles per hour at the perimeter of the fan would be reduced in direct ratio to the reduction in the speed at the axle, for, being integral, the axle speed and the speed of the perimeter, or any point between the two, must remain in direct ratio. I think the excerpts read to me by counsel from the Encyclopaedia Britannica refer to cast aluminum or aluminum metal, which is essentially pure aluminum. If alloying materials are added to change the properties, these figures will not apply. I believe that the breaks of a semi-circular shape on the top of the vanes on Exhibit 3 could be made by being obstructed by a human finger on which there was a metal ring and the hand enclosed in a canvas or cloth glove. If the [181] obstruction was over the right-hand cross

(Testimony of George Shue.)

member, as you look at the front of the radiator, and was thus hindered in its downward movement when struck by the vanes of the fan, that would increase the probability of making such breaks in the fan.

Q. I will ask you if you have examined that particular break on the cross member on Exhibit 2 to determine whether or not it is a break or merely a surface scratch?

The COURT: Will you please mark the point designated with a red pencil. Do not put it on the so-called break, but next to it.

A. The point to which you refer is about six and a half inches from the center of the fan along the right cross member (the witness marking the point designated).

The WITNESS: With a small microscope I examined the break which is about six and a half inches to the right of the center of the cross member upon which it appears, being the right-hand horizontal cross member on the front of Exhibit 2, and it appears to be a crack. I am familiar with the location of the fan and particularly with the axle of the fan in Exhibit 2 with reference to the motor of the Mack truck from which Exhibit 2 was taken, as I actually saw the motor of the truck before the fan and radiator that are now Exhibit 2 were removed from the truck. The photograph marked Exhibit 7 appears the same as the truck did when I saw it, and indicates the relative positions of the

(Testimony of George Shue.)

fan and pet-cocks at the top of the cylinders as to their being in line. If the fan should fly apart by centrifugal force and the pieces should strike against each other and thus be changed from their plane of flight, I do not believe that the pieces in rebounding could exert a very great force at a position close to the axle of the fan. [182]

Q. I will ask you to state whether or not, in view of the construction and placement of the motor and its parts, the number four pet-cock is protected by a portion of the motor which projects above it from any flying pieces that would come from the rear or left-hand side of the fan?

Mr. MAURY: That is objected to as calling for a conclusion which the jury can draw as well as Dr. Shue.

The COURT: The photographs are designated as a correct representation of the fan and the radiator and are going before the jury. For that reason the objection is sustained.

The WITNESS: The breaking of those pieces of the fan could be caused by any force which causes a bending of the vanes.

Re-Cross Examination by Mr. Davis:

The WITNESS: Any sufficient force that might cause the vanes to bend might break them. I saw Mr. Schurman, using his leg as a fulcrum, break Exhibit 1. It was Archimedes who said in substance, "Give me a fulcrum of sufficient strength and I

(Testimony of George Shue.)

will bend the world"; and that is probably true. I think it was because of sufficient fulcrum that the witness was able to exert a force of five thousand pounds to the square inch. While it might have something to do with it, I think the fact that the fan was running out of alignment would have very little to do with causing a fan to break.

Mr. MURPHY: If it please the Court, there was just one question I wanted to ask the witness who has just left the stand. With the permission of Court and counsel I will return him for that one question. [183]

Mr. DAVIS: We have no objection.

The COURT: Very well.

George Shue, being recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: The relation of the centrifugal force exerted by a spinning wheel and the speed of the wheel is that the centrifugal force is proportional to the square of the speed. In other words, if the speed of the wheel is doubled the centrifugal force is four times as great; if the speed is three times as fast then the centrifugal force will be nine times as great, and so on.

Cross-Examination by Mr. Davis:

The WITNESS: If the speed were ten times as fast, then the centrifugal force would be one hun-

(Testimony of George Shue.)

dred times as great; and if the speed were one hundred times as fast, then the centrifugal force would be one hundred squared, or ten thousand times as great. It would depend on what kind of an obstruction or stationary vane there was outside in order to state how far a man could stick in his finger with the fan revolving at six hundred revolutions a minute without the finger being cut off. In this particular fan he could probably put his finger straight in a matter of a fraction of an inch, because there is room to bend it down.

Redirect Examination by Mr. Murphy:

The WITNESS: I have given the measurement from a point which we have designated as six and a half inches to the right of the center of the fan, which was the distance from the cross member at that point to the fan. The distance between the inside of the [184] cross arm and the vane of the fan at a point an inch and a quarter to the right of the center of the cross member is about one and three sixteenth inches.

Re-Cross-Examination by Mr. Davis:

The WITNESS: I think the lower phalange of the ring finger of the ordinary person is not quite an inch in length.

J. M. DENNIS,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Re-Cross Examination by Mr. Davis:

The WITNESS: My name is J. M. Dennis, and I reside at Deer Lodge, Montana. In October, 1933, and since that time I have been in the employ of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company. I recall that late in October, 1933, Clifford Gilbert suffered an injury to his hand in or near the shop plant of the Milwaukee Railroad at Deer Lodge, and that the injury occurred in connection with the handling by him of an automobile truck. Shortly after the accident and within a day or so I was assigned to the work of removing the broken pieces of fan from the case. These pieces that I removed were in the case and around immediately in front of the fan. There had been a rim or band on the front or outside of the fan the same as is now on the back. This was broken off and the pieces of it had to be removed with the other pieces of the fan. We had to break some of the larger pieces in order to get them out. All of the pieces that had formed the front rim of the fan were removed. At that time I observed the condition of the fan that remained in the radiator shell.

Q. State whether or not the breaks which you observed there [185] were fresh or old breaks.

Mr. MAURY: He has not shown any qualification to tell whether a break was a fresh break or an old

(Testimony of J. M. Dennis.)

break, and we object to it on the ground that the witness has not shown himself qualified to answer.

The COURT: The objection is sustained.

Q. Will you please state whether the breaks which you observed in the fan were bright or discolored?

A. All bright.

Cross-Examination by Mr. Maury:

The WITNESS: These breaks were all about the same brightness. Possibly Exhibit 3 at the time I cleaned the pieces of fan from the fan case was in exactly the same condition it is now, except that these breaks were all bright instead of discolored. This break which is marked with the red pencil looks more like the other breaks looked at that time. I did not do any repairing, but simply removed the parts. The parts that were taken out were laid on the outside of the engine somewhere. I do not know just what became of them at that time, and I have not seen them since. I know both Mr. J. O. Jones and Mr. Sears, the master mechanic, but I could not say whether either of those men took those pieces or not. Neither could I say whether or not Mr. L. E. Neumen got them. Mr. Neumen is the claim agent for the Milwaukee Railroad and has been such to my knowledge for five or ten years. He is in the courtroom now. I did not notice particularly to see if there were any cracks in this outer rim, but there seems to be a crack in it now. This vane that is

(Testimony of J. M. Dennis.)

entirely gone except for a little nub is in the same condition as it was then, as far as my recollection goes. I did not break the large piece out of the fan from the place marked with red pencil, and [186] I could not say how it got broken out. It does not appear to have been broken out at the time I saw the fan, but I could not say whether somebody has broken it out since that time. I did not try to fit back in any of the pieces to see if they corresponded with the breaks in the fan, nor do I know of anyone else doing so. I could not say whether there were any pieces missing so that if the pieces were fitted back in they would not make a complete fan. The pieces I took out I gathered from the bottom of Exhibit 2. I could not say whether the truck had a radiator cap on it at the time.

Redirect Examination by Mr. Murphy:

The WITNESS: I believe when I finished cleaning out the pieces of the fan I turned the fan to see if it was in the clear or if there were any parts touching any part of the fan. Either Mr. Jones or Mr. Sears assigned me to this work, but I could not say which one.

Re-Cross Examination by Mr. Maury:

The WITNESS: I did this work before the truck was again put in use after the accident.

WALTER STEPHENS,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: My name is Walter Stephens. I am station baggageman for the Chicago, Milwaukee. St. Paul & Pacific Railroad at Butte. I have been employed in that particular position for three years, and I was so employed during the latter part of 1933 and during the year 1934. I received at that baggage-room a package addressed to L. E. Neumen, the claim agent. I could not [187] state approximately when the package was received, but I notified Mr. Neumen when it was received, and Mr. Neuman told me to put the package away for him. I had the package sitting on the shelf for six or seven months, I would say, and finally the superintendent gave us orders to make a general cleanup of everything that was in the baggage-room. I was up in front checking baggage and the men who were cleaning up the baggage-room got hold of this box and threw it onto the pile of rubbish already lying on the floor, and when I walked back I happened to notice there was a fan sticking out of the carton, and I said, "Put that back on the shelf again." The fan was picked up and placed back on the shelf and the carton was dumped in a box car that was standing outside. The fan remained in the baggage-room of which I have charge

(Testimony of Walter Stephens.)
until a couple of days ago, when it was removed by Mr. Neumen.

Cross-Examination by Mr. Davis:

The WITNESS: I did not break this fan, and so far as I know the fan is in exactly the same condition now as it was when it first came to me. I did not see anybody break any part out of it. The carton was thrown away. Whether or not it was empty I could not say.

L. E. NEUMEN,

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Murphy:

The WITNESS: My name is L. E. Neumen. For a good many years I have been employed by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and I was in its employ during all of the years 1933, 1934, and up to the present time. Before this fan, [188] Exhibit 3, was brought to Helena for this trial I last saw it at the baggage-room in Butte on Tuesday of last week. The last time previous to that that I saw the fan was while it was still in the truck at Deer Lodge. I was informed by Mr. Stephens that a package had arrived at the Butte baggage-room for me, and I told Mr. Stephens to keep it in the baggage-room for me.

(Testimony of L. E. Neumen.)

Q. Do you know what the container had in it?

A. Yes; I had received word from Mr.——

Mr. MAURY: We move *the* strike the answer, "I had received word." If he knows he must know of his own knowledge.

The COURT: The question can be answered yes or no, Mr. Neumen. Do you know what the contents of that carton were?

The WITNESS: Yes, I did.

Q. Do you know of your own knowledge, by an examination of the carton, what was in it?

A. No.

Q. Did you have any information as to what it contained?

Mr. MAURY: We object to that as not the best evidence.

The COURT: The objection is sustained. If a man doesn't know of his own personal knowledge he cannot testify, Mr. Murphy. That is the limitation of testimony except in certain capacities.

Mr. MURPHY: I think that is true. I don't think it is material in the case. It is simply to show——

The COURT: If it isn't material let's leave it out. We are taking up enough time on material matters without injecting immaterial ones. [189]

The WITNESS: Prior to the beginning of this

(Testimony of L. E. Neumen.)

trial I made a search for the broken parts from Exhibit 3. I knew the fan was at the baggage-room in Butte, and I went there to get it and the parts that were broken from it, but I found only the broken fan.

Q. I will ask you to state whether or not you, before going to get the fan, expected to find the fan and the parts together?

Mr. MAURY: We object to this as leading and not material; and what his psychology on the subject was does not concern anybody.

The COURT: The objection is sustained.

The WITNESS: I made further search for the parts but did not find them, and I do not know where they now are.

Cross-Examination by Mr. Maury:

The WITNESS: Mr. Sears did not hand those parts to me in Deer Lodge, nor did Mr. Jones or anyone else. Dr. Unmack, the doctor who treated the plaintiff, has not been in court during the trial of this case to my knowledge. He was not here Friday that I know of.

Mr. MURPHY: He was not in court, Mr. Maury, but I am perfectly willing to admit and the record may show that he was here during some part of the trial in Helena, but not in the court-room.

The COURT: You say the trial in Helena. You mean the trial now in progress?

Mr. MURPHY: The trial now in progress, yes.

DOCUMENTARY EVIDENCE

Mr. MURPHY: Now, if the Court please, we offer in evidence Exhibit 11. This is the only copy I have, and [190] I ask leave to withdraw the certified copy which I have and make a copy later to be left with the record.

Mr. DAVIS: We have no objections.

The COURT: It is admitted without objection, and Mr. Halloran will make a copy of it, which will, thereupon, be certified by the Clerk of the Court. The original may then be withdrawn and the certified copy substituted in the record in its place.

(The exhibit was received in evidence as Defendant's Exhibit 11, and it is in words and figures as follows:)

DEFENDANT'S EXHIBIT 11

Order No. 1.

In The
District Court of the United States
For the Northern District of Illinois,
Eastern Division.

In Proceedings for the Reorganization of a Railroad

No. 60463

In the Matter of
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor.

ORDER.

Upon due consideration of the petition of Chicago, Milwaukee, St. Paul and Pacific Railroad Com-

pany, the above named Debtor, verified June 28th, 1935, and filed herein this day, stating that such Debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization pursuant to Section 77 of the Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and the Acts amendatory thereof and supplementary there- [191] to; and the Court being satisfied that such petition complies with said Section 77 and has been filed in good faith, it is ORDERED:

(1) That said petition be, and it is hereby approved as properly filed under Section 77 of said Act.

(2) That the Debtor be, and it is hereby, authorized and directed, pending further order of this Court to continue in possession and control of its properties, assets and business, and to run, manage, maintain, operate and keep in proper condition and repair the railroad and properties of the Debtor, wherever situated, whether in this State, Judicial Circuit, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority, rights and franchises and to discharge its public duties; to employ or discharge and to fix the compensation of all its officers, counsel, attorneys, managers, superintendents, agents and employees (provided, however, that the compensation of all officers of the Company shall continue at the present

rates until further order of this Court and that the attorney or counsel of record for the Debtor in this proceeding or the counsel retained by the Debtor in connection with the preparation and consummation of its Plan of Reorganization shall be paid only such reasonable compensation for services rendered and reimbursement for expenses hereafter incurred as shall hereafter be allowed by this Court pursuant to said Section 77); to collect and receive the income, rents, revenues, tolls, issues and profits, accrued or to accrue, from its railroad and properties; to collect all its outstanding accounts, and all dividends and interest on securities belonging to it; to sell, convey, or lease property, real or personal, not needed in the operation of its railroad, and to exercise such rights of sale, conveyance, exchange [192] and release as are reserved to, or available to, it under its outstanding deeds of trust, mortgages, trust indentures, and similar instruments, and to use the proceeds of sale of released property as provided in such instruments, all in the same manner that it would be entitled to do in its own right; and, to the extent necessary to protect, preserve or benefit its railroad or properties or business, to make and pay for additions and betterments thereto and thereof; to perform its existing contracts incurred in the regular course of business to the extent that performance thereof may seem desirable, but such performance shall not constitute an affirmance of said contracts or any thereof; to enter into and perform other contracts in the regular course

of the conduct of its business; all to the end that the business of the Debtor may be continued, operated and managed according to the customary and usual manner of conducting its business; all of the foregoing powers to be exercised by Debtor according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein;

(3) That the Debtor is authorized in its discretion, from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the properties, income, franchises, or business of the Debtor?

(b) All necessary current expenses in operating the railroad, preserving the assets and conducting the business of the Debtor, including, among other expenses, the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the Debtor (subject, however, to the provisions of paragraph (2) of this order with respect to the payment of compensation of [193] any such officers, attorneys or counsel); the charges for freight, ticket, switching, car mileage, per diem, switching reclaim, division and all other interline accounts and balances; the consideration of adjustment or compromise of claims for loss, damage or delay to freight, for overcharges and for repa-

ration; joint facility and equipment rental (subject, however, to the limitation hereinafter provided with respect to the payment of principal or interest of equipment obligations covering equipment leased by the Debtor) and expenses and accounts for materials and supplies; also, all sums now due or which may hereafter become due to other persons or corporations for car or equipment repairs or for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad facilities and such sums as may be necessary to comply with the obligations of the debtor under contracts or leases by virtue of which such occupation or use may now or hereafter be enjoyed, but such payments shall not constitute affirmations of such contracts or leases, or any of them;

(c) The following claims incurred by the Debtor within six months preceding the date of this order, to-wit: wages, salaries, fees and other charges due and payable for services rendered to the Debtor in the usual and customary operation of its properties and the conduct of its current business, unpaid material and supply accounts incurred in the operation of said properties, unpaid and outstanding pay checks and wage checks representing labor actually performed for the Debtor, and unpaid ticket, traffic, car mileage and car per diem balances,

interline accounts; freight and overcharge claims and accounts [194] for car and equipment repairs incurred by the Debtor;

(d) Claims for or arising out of loss, damage or delay to freight or baggage; overcharges, reparation; adjustments of or refunds for freight or other charges on shipments, including shipments in connection with which there are charges for transit or storage privileges; freight, ticket, switching, car mileage, per diem, switching reclaim and all other interline accounts and balances; rental of equipment or rental of or expense arising from use or operation of or over joint or other facilities; outstanding checks for wages, fees or services; claims for personal injuries to employees which are preferred under the Acts of Congress relating to bankruptcy; and other claims, charges or adjustments of similar character between Debtor and other carriers in the conduct of their joint business, between Debtor and its patrons and between Debtor and its employees; all regardless of when accrued; and the Debtor is hereby authorized, in its discretion, pending further order of this Court, to pay, adjust, compromise, make advances for, or reimburse others for so adjusting, compromising, making advances for, or paying on the Debtor's behalf any of the foregoing claims;

(e) The cost of maintaining the corporate existence of the Debtor, including corporate,

franchise, stamp and similar taxes, fees and expenses, and fees and expenses in connection with directors meetings, such office rent as may be required and the necessary expense of keeping and preserving its corporate records, of maintaining transfer offices and agents, of registering and transferring its securities and of paying the proper charges and expenses of the trustees under indentures or mortgages pursuant to which securities of the Debtor have [195] been issued;

(f) Such allowances as heretofore have been allowed and paid by the Debtor to superannuated employees and employees who have become disabled or incapacitated in the Debtor's service; and

(g) The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this case, in sufficient quantities to provide copies thereof for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause, and others who may have a substantial interest therein; such expense to be taxed as costs in this case;

Until the further order of this Court, no payment shall be made by the Debtor upon or in respect of the principal of or interest on any of its funded debt including principal of or interest on any equipment obligations constituting a lien upon equipment leased by the Debtor, and including therein, without

limitation, all obligations representing funded debt of the Debtor listed in Article I of the Plan of Reorganization dated July 1, 1935, of the Debtor, annexed to said petition of the Debtor and marked Exhibit A.

(4) That the Debtor shall have the power to elect whether to adopt or continue in force, or to refuse to adopt or continue in force or to disaffirm or reject, any lease, trackage, terminal, crossing or operating agreement, or other contract not fully performed to which it is a party or under which it may be obligated; and the Debtor is hereby allowed a period of six months (or such further period as this Court may allow) from the date of the entry of this order to make such election. Any such election may be made from time to time, and shall be made by instrument in [196] writing signed by the duly authorized officer or officers of the Debtor and delivered, or mailed by registered mail, postage prepaid, addressed to, the other party or parties to said lease, agreement or contract; and any such election shall be effective when a copy of such instrument, together with proof of delivery or mailing of a copy or copies thereof as aforesaid to the other party or parties to such lease, agreement or contract shall be filed of record in this proceeding. No conduct or user or rights by the Debtor or payments made by the Debtor as rent or otherwise, or accepted by it as rents or otherwise, or any other acts or omissions by the Debtor during said period (or such other period as this Court may allow) ex-

cept an instrument filed and delivered or mailed as aforesaid expressly adopting any such lease, agreement or contract shall be deemed to preclude or conclude the Debtor in respect of such election or be deemed to constitute an election to adopt or continue in force any such lease, agreement or contract.

(5) That pending further order of the Court in the premises the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights and to make settlement of any thereof; and likewise to defend or to liquidate by written agreement or consent, judgment, decree, order or award any claim, demand or cause of action, whether or not suit or other proceeding to enforce the same has been or shall be brought in any court or before any officer, department, commission, board or tribunal, but no payments shall be made by the Debtor in respect of any such claims accruing prior to the date of this order, or in respect of any actions, [197] proceedings or suits on such claims, without further order or direction of this Court, except such as may be permitted by this or other orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon, or right

in, the property or funds in the possession of the Debtor that otherwise would not exist;

(6) That the Debtor shall close its present books of account at midnight on the 30th day of June, 1935. The Debtor shall open new books of account at the beginning of the day of July 1st, 1935, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the Debtor, and shall preserve proper vouchers or receipts for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the Debtor are presently deposited as shall be selected by the Debtor, or in such other bank or banks as shall be selected by it and approved by this Court;

(7) That, not later than the 31st day of August, 1935, the Debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on the 30th day of June, 1935, and, within forty-five days after the close of each calendar month thereafter, shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of the business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the Debtor for the second preceding calendar month. All such statements shall be certified [198] as correct by the chief accounting officer of the Debtor;

(8) That the Debtor is hereby directed to prepare and file with the Clerk of this Court on or

before 30 days from the date of the entry of this order, in lieu of the schedules required by Section 7 of said Bankruptcy Act, a balance sheet of the Debtor as of the latest practicable date, together with supporting schedules, in the form of annual statements made to the Interstate Commerce Commission, and such other information as this Court may hereafter direct as necessary to disclose the conduct of the Debtor's affairs and the fairness of any plan of reorganization of the Debtor proposed under Section 77 of said Bankruptcy Act;

(9) That the Debtor is hereby authorized and directed within 15 days from the date of the entry of this order (unless a later date be directed by this Court, upon cause shown) to prepare (a) a list of all known bondholders and creditors of, or claimants against, the Debtor, or its property, and the amounts and character of their debts, claims and securities, and the last known post-office address or place of business of such creditor or claimant and (b) a list of the stockholders of the Debtor, with the last known post-office address or place of business of each. The contents of such lists shall not constitute admissions by the Debtor or any trustees of the estate in this proceeding. Such lists shall be open to the inspection of any creditor or stockholder of, or claimant against, the Debtor, during reasonable business hours, upon application to the Debtor or any such trustees;

(10) That all persons, firms and corporations, whatever and wheresoever situated, located or domi-

ciled, be and they are hereby restrained and enjoined from interfering with, attaching, [199] garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portions of the assets, goods, money, railroads, properties, or premises belonging to, or in the possession of the Debtor, or from taking possession of, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business by the Debtor under the orders of this Court, or from bringing any new suits, actions or proceedings or causes of action accruing prior to this date in or before any Court, Commission or tribunal from which an appeal, or proceeding to review, can be taken only upon the filing of an appeal bond as a jurisdictional or mandatory requirement;

(11) That all persons and corporations holding collateral heretofore pledged by the Debtor as security for its notes or obligations be, and each of them is, hereby restrained and enjoined from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of this Court.

This Court reserves full right and jurisdiction to enter at any time further orders in the premises as the Court may deem proper, including the right to amend, extend, limit, modify or otherwise change or rescind the present order.

Enter:

JAMES H. WILKERSON,
District Judge.

Dated: June 29, 1935. 10 A. M. Daylight Savings Time

(Duly certified to by the Clerk of the above entitled court, under his hand and official seal, as a correct copy of order made and entered in said court on the 29th day of June, 1935, as fully as the same appears of record in his office.

THE DEFENDANT RESTED [200]

PLAINTIFF'S REBUTTAL.

JAMES GILBERT,

recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. Maury:

Q. Mr. Gilbert, you testified on the case in chief that you had this piece of aluminum which has now been broken but which was then one piece, and I am showing you Exhibits 1 and 1-A. What did you do with that piece when you last saw it before this trial?

Mr. MURPHY: That is objected to simply for the reason that it is part of the plaintiff's case in chief, and not proper rebuttal, and too late.

The COURT: The plaintiff is granted permission to re-open his case in chief, if he deems it proper.

Mr. MAURY: We ask that permission of your Honor.

(Testimony of James Gilbert.)

The COURT: Granted.

A. I took that piece home and kept it at the city hall until the case started—until I hired Tom Davis about ninety days after the son got his fingers cut off. Then I took it up to Tom Davis's office.

Mr. MURPHY: For the information of the jury, may the record show that the complaint was verified——

Mr. MAURY: We agree that the complaint was verified April 20, 1934, and that it was filed with the Clerk of the Court on April 23, 1934.

THE PLAINTIFF RESTED IN REBUTTAL.

[201]

DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

Mr. MURPHY: Comes now the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, at the close of all the evidence in the case, and after the plaintiff has announced final resting of the case, and moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff, for the following reasons and upon the following grounds, to-wit:

1. That there is no evidence sufficient to justify a verdict or support a judgment against the defendant.

2. That there is a complete failure of proof to support the essential allegations of the complaint.

3. That there is a failure of proof to establish any negligence on the part of the defendant which is a proximate cause of the injury complained of.

4. That there is a failure of proof to show any violation of duty owing from the defendant to the plaintiff.

5. That there is a failure of proof to support the particular element of negligence or failure of duty on the part of the defendant charged in the complaint.

6. That there is no proof to support notice of a defective condition of the particular instrumentality which is alleged to have given away or failed, thus causing the injury to plaintiff, or any lack of ordinary care to discover the same.

7. That it is not shown that the injury was the proximate result of the negligence alleged.

8. That the evidence discloses that the injury suffered by plaintiff, if it occurred in any manner alleged in the complaint, was brought about by conditions well known to and appreciated by the plaintiff, the danger and risk of which he assumed. [202]

9. That the evidence affirmatively discloses that the instrumentality herein complained of, that is to say, the Mack truck, was a borrowed truck delivered to the defendant by the plaintiff and the guardian ad litem of the plaintiff, acting jointly, and with full knowledge on the part of each of them of its condition, and particularly of its defects, if any.

10. That there is a fatal variance between the allegations of the complaint and the proof herein.

11. That the complaint herein does not state facts sufficient to constitute a cause of action against the defendant.

The COURT: The motion is denied.

Mr. MURPHY: Our exception is noted, I take it.

The COURT: Yes.

Mr. DAVIS: May it please the Court, may the record show that the plaintiff in this case, Clifford Gilbert, has elected to stand upon the allegations set out in the counts in relation to intrastate commerce; and we consent, may it please the Court, to the two counts set out in relation to interstate commerce being dismissed?

Mr. MURPHY: We simply want to renew our motion which the Court has just passed on. I would say, your Honor, that I believe there is no sufficient proof in this case to support the allegation of interstate commerce.

The COURT: On motion of plaintiff's counsel counts one and two, contained in the complaint in this action, are dismissed and a judgment of dismissal as to them is ordered entered. Proceed with the argument on the part of plaintiff.

(Thereupon, the cause was, by respective counsel, argued to the jury.) [203]

The COURT: For the purpose of the record, gentlemen, the Court intends to give the instructions requested by the plaintiff and marked as follows:

Plaintiff's 1, Plaintiff's 2, Plaintiff's 3, Plaintiff's 4, and Plaintiff's 6. The Court refuses to give plaintiff's requested instruction now marked Plaintiff's 5. Has the plaintiff any objection to the order of the Court?

Mr. MAURY: The plaintiff has no objection or exception.

The COURT: The Court intends to give instructions requested by the defendant and marked by the Court as Defendant's 1, Defendant's 2, Defendant's 3, Defendant's 4, Defendant's 12, Defendant's 17, Defendant's 18, and Defendant's 19. The instructions given will be read in the charge and passed to counsel, and you will be given an opportunity at the close of the charge to state your objections. The Court refuses to give the instructions requested by the defendant and marked by the Court as Defendant's 5, Defendant's 6, Defendant's 7, Defendant's 8, Defendant's 9, Defendant's 10, Defendant's 11, Defendant's 13, Defendant's 14, Defendant's 15, and Defendant's 16. Has the defendant any objection or exception to the refusal of the Court to give these instructions?

Mr. MURPHY: We object and except to the action of the Court in refusing to give each of the instructions 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16, separately, for the reason that each is a correct statement of the law applicable hereto not otherwise covered in the charge.

Said instructions so offered and requested by the defendant, and which the Court refused to give, are in words and figures as follows, to-wit:

(5) You are instructed that the law presumes that the truck furnished by the defendant to the plaintiff was not defective, [204] and that if the truck were actually defective the law further presumes that the defendant had no knowledge of the defect and was not negligently ignorant thereof. This presumption has the force and effect of evidence on the defendants behalf.

(6) You are instructed that even though you may find from the evidence that the defendant knew or in the exercise of ordinary care should have known of various defects in the truck, such as its failure to start, its tendency to overheat, the tendency of the motor to miss, etc., yet unless you find from a preponderance of the evidence that the defendant knew or in the exercise of ordinary care under the circumstances should have known that the fan upon said truck was so defective that it could reasonably be anticipated that it would explode and cause injury to the driver of said truck, your verdict should be for the defendant.

(7) It is admitted in this case that the plaintiff just prior to and at the time of the accident had full control, care and management of the entire automobile truck which is alleged to have caused his injury, and if you believe that the accident arose out of and was proximately caused by the method or manner adopted by him in making adjustments in the motor thereof, or by his negligence or inattention in any respect, and not by the negligence of the defendant as charged, you shall render a verdict in favor of the defendant.

(8) If an employee chooses the more dangerous of the two ways to perform a certain act, he assumes the risk of injury therefrom. Therefore, if you find from the evidence that the plaintiff could have corrected the condition of the fourth pet cock on the truck without keeping the motor running, and that it was more dangerous to adjust the same while the motor was running, your verdict should be for the defendant. [205]

(9) The plaintiff was hired by the defendant to serve as a driver of the truck. If you find that the plaintiff's acts in attempting to repair or correct the alleged defective condition or operation of the truck were not a part of his duties and were outside the scope of his employment as a driver, even though they were intended for the defendant's benefit, the defendant is not liable for the injuries received by the plaintiff as a result thereof, and your verdict should be for the defendant.

(10) Where an employee receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used.

(11) Therefore if you find from a preponderance of the evidence that the defendant furnished to the plaintiff a truck in a defective condition, which increased the hazard incident to its use, and

the plaintiff was aware of the condition of increased hazard thus brought about, or such condition was so obvious that an ordinarily prudent person of the plaintiff's mechanical skill and personal knowledge and experience with the truck would have observed and appreciated the condition, the plaintiff must be held to have assumed the risk of injury and your verdict must be for the defendant.

(13) The statement in these instructions that the plaintiff must have known and appreciated the danger means simply that he must have known the conditions from which the danger arose. Appreciation of danger is conclusively presumed from knowledge of the conditions even though the plaintiff has testified that he did not in fact appreciate the danger. An employee cannot claim ignorance of a hazard which would be obvious to a reasonable and [206] prudent person under the same circumstances.

(14) One whose duty it is to operate a certain machine is held to a stricter rule of assumption of risk in connection therewith than an employee who has no such duty to operate the machine.

(15) You are instructed that you shall disregard any testimony which you find to be in conflict with physical facts or the law of nature.

(16) You are instructed that there is no evidence of loss of earning capacity by the plaintiff, and that therefore you may award him no damages for loss of earning capacity as a result of his injury.

(The Court charged the jury as follows:)

Now, gentlemen, in the trial of every cause there are several functions to be performed by the several officers of the court. The attorneys for the plaintiff, as well as the attorneys for the defendant, are officers of the court, just as the jurors sitting in the trial of the case and the judge presiding through the trial are officers of the court. Each of us has a separate and distinct duty to perform. It is the duty of the plaintiff and his counsel to present their case fairly so far as known to them and in a light that will sustain the cause that they believe they have. It is the duty of the attorneys for the defendant and the defendant likewise to present fairly the facts that may be known to them and which may prevent a recovery in the case. During the taking of testimony the function of the judge is merely to act as arbitrator and pass upon controverted questions between counsel for the various parties. At the conclusion of the trial it is the duty of the judge to give what is known as the Charge to the [207] Jury. It is his duty, as a matter of law and because of his office, to state to you the legal principles that he believes apply to and should control the decision in the case.

It is not for you to question the law as given by the Court. That is a function of the Court and a duty that he can give to no one else; and whether you believe that the statements of law that I may give to you are right or wrong, you are bound by your oath to take the law as I state it to you.

On the other hand, the Constitution and the statutes of the United States provide and require that in cases of this kind the facts shall be decided by the jury. A jury of twelve men is called upon to hear the testimony, to observe the witnesses during the trial of the case, and after learning from the Court what the law is, to decide the case, as counsel have stated, not according to the wealth or standing of the parties, not in the light of sympathy that a jury may have for a party suing or being sued, but merely in the light of the law and the facts as they appear to them from the testimony of the case, and to decide the case fairly on the law and the facts.

I cannot agree with the statement of counsel in argument that you have made up your minds in this case, because every time we took a recess you were admonished by the Court that you should not form an opinion as to the merits of the case. It may be that the argument of counsel and the instructions of the Court are not going to have any influence. I feel that they will, and I feel that the argument of counsel has assisted you in knowing what the facts in the case are and in recalling them. I know that you will take the law as I give it to you.

In every lawsuit the party coming into court is required to file what is known in law as a Complaint, which contains the [208] facts on which he bases his right of recovery; in other words, a statement of the things that he says in law give him a right to the judgment that he asks. In every law-

suit a defendant is given a right to come into court and admit or deny the allegations of the complaint. If he admits an allegation the fact is taken as true by you and me; if he denies an allegation of the pleading, it casts upon the plaintiff the burden of proving by a preponderance or the greater weight of the evidence the truth of the allegation contained in his complaint. In addition, the defendant has a right in his answer to set out what we call affirmative defenses—defenses which, in effect, admit the truth of the allegations contained in the plaintiff's complaint, but say, notwithstanding the facts stated in the complaint are true, there are other facts which prevent his right to recover in this cause. In this case the defendant has taken advantage of its right to admit, of its right to deny, and of its right to state what we call pleas by way of confession and avoidance; that is, conceding all of the facts stated by the plaintiff to be true, there are facts which will prevent him from recovering in the case which he has brought. And in its answer the defendant has pleaded by way of affirmative defense and by way of confession and avoidance what is known as the defense of contributory negligence and what is known as the defense of assumption of risk.

In this case it seems to me that there is very little controversy on many facts. The plaintiff, in his first cause of action, alleges that he was employed by the defendant. There seems to be no controversy upon that point. Now, gentlemen, I am commenting

on the evidence. As I told you before, it is for you to determine and to decide finally what the evidence does [209] show. I have the right to express my opinion upon the evidence, and I shall do so in this case in the hope that I may assist you. The plaintiff has stated in his complaint, in the beginning, four causes of action. The first and second causes of action are based upon the theory that the defendant and the plaintiff were engaged in interstate commerce at the time the plaintiff received the injury of which he complains. Now, gentlemen, I suggested to counsel that in my opinion the evidence is not sufficient to show that either the plaintiff or the defendant was engaged in interstate commerce; that is, commerce crossing state lines—beginning in one state and ending in another; and upon that suggestion being made, counsel dismissed the first and second causes of action. The dismissal of those causes must not lead you to think that I believe the plaintiff started a case that he had no right to bring into court and submit to you for decision. It merely means that he availed himself of a right which the law gives to state his cause in varying theories, so that the Court will be justified in permitting him to prove the facts from which it may be determined upon which cause, if any, he shall succeed.

The third and fourth causes, which now remain before you for decision, are based upon what is known as the law of Montana regulating railroads.

That statute applies only to commerce within state lines. It is very similar to what is known as the Federal Employees' Liability Act, which act applies only to commerce and to men and companies engaged in commerce between states. The Montana law relates to this case, as I view it. It is not shown that anything the plaintiff in the case was doing at the time he was hurt was extending across state lines. There is nothing in the testimony, as I view it, showing that the defendant was at that time, and in the particular work then had, engaged in trans- [210] porting anything from state to state. So, as I say, plaintiff having, for the purpose of safety, based his cause upon two laws, the first, the Federal Employees' Liability Act, and the second, the law of Montana regulating its railroad companies, which latter applies only to intrastate commerce or commerce within the lines of a single state, we have the case now showing the same facts but based entirely upon Montana law.

The matters pleaded by the plaintiff in the third and fourth causes of action, and also in the first and second, are based upon the fact that the defendant was at the time of plaintiff's injury engaged in operating a railroad in the State of Montana. There is no controversy upon that. All the parties agree and show by their testimony that that was a fact.

The next element necessary is the employment of the plaintiff by the defendant in the work that it was doing within the State of Montana, or, spec-

ifically, in the vicinity of Deer Lodge, in Powell County, in this state. All the witnesses agree, whether they are witnesses for the plaintiff or the defendant, that he was so employed.

The causes of action before you allege that his employment consisted in the operation of a truck furnished by the defendant for his use in removing certain debris from railroad ground, which debris was caused by a fire at the railroad shops and roundhouse of the defendant corporation in Deer Lodge, Montana, in October, 1933. All of the testimony shows that.

There is no dispute as to the injury that the plaintiff in this case suffered. The plaintiff has told you what the injury is. The defendant's witnesses, from the master mechanic to the first aid man, have told you that the plaintiff received the injury that has been shown here while he was working upon the [211] truck that the defendant provided for his use in carrying on the work.

There appears to be no controversy among the witnesses here that at the time the injury was received the truck had stalled because of some internal trouble. There seems to be no controversy between the witnesses of plaintiff and defendant concerning the fact that the plaintiff in the case had raised the hood of the truck and was trying to make some adjustment for the purpose of causing the machine with which he had to do his work to operate as it should operate, so that he might

carry on his work and do the service that he had been hired or employed to perform.

So, as I say, every element in the case appears to be admitted by all the parties except the question as to whether the injury to plaintiff, which it is conceded by all the parties the plaintiff suffered, was received as a result of some neglect or failure of duty on the part of the defendant in the case. And that simmers down to a single question as to what the condition of the truck was and what were the exact facts concerning the receipt by plaintiff of his injuries.

The complaint proceeds upon two theories, and plaintiff has a right, as I say, under the law to state different theories, so that evidence covering the entire situation may be brought to the attention of the Court and the jury on the trial of the cause. Plaintiff is required to state the different theories of injuries in separate counts, and hence the two counts in the complaint remaining for consideration.

In the first count under consideration here (the third count of the complaint) the plaintiff bases his right of recovery upon what he contends was a breach of the duty of the defendant to furnish him with a reasonably safe tool and appliance with which [212] to carry on the work that he was called upon to do in the course of his employment. The question under that cause of action is: Is it shown by the testimony in this case, considered in its entirety, by a preponderance or the greater weight

of the evidence, that the allegations of the third cause of action stated in the complaint are true? In other words, boiled down, the question under that cause of action for you to determine is: Does it appear from the greater weight of the testimony in this case that the defendant failed to provide plaintiff with a reasonably safe place to work and a reasonably safe appliance to work with?

The second cause of action that is now before you for consideration (the fourth count of the complaint), in all essential statements of fact, is identical with the first that you are to consider, except that in the fourth count the plaintiff alleges that the defendant failed to inspect and repair the instrument with which he was required to work, and that as a result of that failure to inspect and repair he received the injury of which he complains. That is the question, as I say, under the second cause of action that is to be considered by you. In considering this question it is for me to determine what the duties of the defendant were at and immediately prior to the time when plaintiff received his injuries, and what the rights and duties of plaintiff were at that time, and for you to determine what the weight and effect of the evidence is. It is the right of the plaintiff and defendant to request the Court to give certain instructions that they believe to state the law. It is the duty of the Court to give instructions requested if it feel that the proper rules are stated for application to the

facts as disclosed by the testimony and the pleadings in the case. There are certain instructions requested which do, in my opinion, state [213] legal principles that should be given to you as the law in this case. These instructions are as follows:

You are instructed that no presumption of negligence arises from the happening of an accident, or from the fact that plaintiff was injured. The burden is upon the plaintiff to show by a preponderance of all the evidence—a preponderance of the evidence merely means that degree of evidence which satisfies you of the existence of a fact, or the greater weight of the evidence—a breach of duty owing from defendant to plaintiff in the particulars charged in the complaint—as I have told you, the particulars charged in the complaint are that the defendant failed to provide the plaintiff with a reasonably safe place to work and a reasonably fit and proper tool or appliance for the carrying on of his work, or a failure to inspect that tool or appliance once it had been supplied, and to make repairs which were necessary to make it safe for the use that he was required to make of it—and amounting to negligence as negligence is defined in these instructions, and to show further by a preponderance of the evidence that the injury complained of proximately resulted from such breach.

You are further instructed that a negligent act or omission cannot be the proximate cause of an injury unless it is of such a character that a person

of ordinary intelligence under the circumstances of the case could have foreseen that the injury complained of, or some injury to the plaintiff, was likely to be caused thereby.

The test to be applied in determining whether the injury was proximately caused by some act on the part of the defendant or some omission on its part is, whether the injury was a reasonably foreseeable event, as the natural and probable consequence [214] of the act or omission, if any, of the defendant or its agent. This does not mean that one reasonably might have foreseen that that truck would stall, or that the plaintiff in this case would be required to leave the position where he sat in driving the truck to get on the ground and open the hood to try to make some adjustment of the pet-cocks or the motor, or that the fan was going to blow up, if it did blow up, or become jammed and break, if it did become jammed and broke, and that the plaintiff's finger would be cut off. It merely means that the conditions were such that it might be reasonably foreseen that some injury might result to someone if that someone made an effort to use the machine in its then condition. If it were otherwise, a defendant would have a perfect defense in every action preferred against it, because if it were a rail broken or misplaced on the line of railroad they would say that it was only one rail that was out of line and misplaced or broken, and we could not foresee that that particular

rail was going to get broken or that this particular train or person was going to pass over that rail. It comes down to the single thought that an injury may be said to be within the rule of this clause, as I have stated it to you, if it is reasonable to suppose that conditions may arise which will bring about an injury to some person or thing.

You are instructed that the defendant in this case is not to be held responsible for latent or hidden defects which could not be discovered by the exercise of reasonable care on its part in the examination and inspection of the fan which is alleged to have exploded and caused the injury to the plaintiff herein. Your consideration is not confined to an explosion of that fan, for it is pleaded here that the fan became jammed and broke and did explode. So you have a right to consider whether that [215] fan did or did not become jammed and break. From my hurried examination of Exhibit 3. the fan, with reference to the recent break that is marked red, it appears to me that there is another break in that fan on one of the edges that appears to be of about the same color as the break into which Exhibit 1 was found to fit. That is a circumstance that you have a right to consider in determining whether or not there was an obstruction which caused the piece here in evidence as Plaintiff's Exhibit 1 to be broken from and fly out of the fan.

You are instructed that if you believe that the injury complained of was accidental in its nature,

and arose unexpectedly under circumstances which could not reasonably be foreseen, then, even though you may believe that the fan exploded and that such explosion was the proximate cause of injury to the plaintiff, there is no liability to the plaintiff, and your verdict must be for the defendant. I am giving you this instruction merely as a matter of precaution. It is for you to say, though I doubt you can properly say, that the injury complained of was one which was entirely unexpected or entirely accidental in its nature. In law it was not entirely unexpected, and it was not purely accidental, for the facts and conditions surrounding the employment of the plaintiff in the case and the mechanism with which he worked were such as to cause one with knowledge of such matters to reasonably conclude that some injury might occur to the one operating that machine.

You are instructed that if the plaintiff knew of any defect in the truck furnished him by the defendant, or if the defect and risk were so obvious that an ordinarily prudent person under the same circumstances would have observed and appreciated them, then by his continuing in employment without objection or without [216] obtaining from the defendant any assurance of remedying the defect, the plaintiff assumed the risk of injury, even though it arose out of the defendant's breach of duty. Now, gentlemen of the jury, we have the testimony of one witness in this case produced by the defendant, the witness Schurman, who testified directly, if my recol-

lection is correct (it is for you to decide the question), that he had tried to drive that machine. That on the first trip he was required to do what? He was required to get out and make an inspection of the machine. Why? Because the motor heated and it commenced to misfire. In other words, the machine was not firing properly, he said, and so he got out and examined the pet-cocks. Now, it appears from that testimony that he was there confronted with the same situation that the plaintiff in this case was confronted with when he was driving the machine prior to the accident. The motor heated, the machine was not firing or operating properly, and Schurman got out and did what the plaintiff was trying to do. He got out and examined the pet-cocks on the car. He said he found them what? Full of carbon; and that he cleaned the carbon out. He then said, if my recollection is true (it is for you to decide), that he examined the ignition and the sparks; and he then said, as I recall it, that he did not go any further because he could not make any further inspection without taking the machine down and taking it apart. It is for you to say whether, under that condition, this young man knew, or in the exercise of ordinary care could know, of the condition of something that he could not reach, that he could not get to to make an examination of, that could not be examined by him, if we believe the witness Schurman, without taking the machine down and taking it apart.

You are further instructed that the plaintiff has alleged [217] that he was injured in a certain specific manner—no doubt about the manner in which his finger was cut off and another finger injured—as a result of certain alleged acts of negligence on the part of the defendant. You are instructed that the plaintiff has the burden of proving his case by the preponderance of all the evidence, and, therefore, if you find that the evidence is evenly balanced, or that the manner of happening of the injury is as consistent with some other explanation as with the allegations of plaintiff's complaint, then the plaintiff has failed to sustain his burden and your verdict should be for the defendant. In this case it appears to me that there are only two theories. The plaintiff says that the fan exploded or became obstructed and broke, and that a piece flew out and cut off one finger and injured the little finger. That is either true or it is not. The defendant's theory appears to me to be that the plaintiff stuck his finger into that revolving fan. Now, you have a choice of one of those two theories.

You are instructed that the plaintiff, in order to recover, must prove by a preponderance of the evidence one or more of the acts of negligence alleged in his complaint, and, further, that such act or acts of negligence proximately caused the injury complained of, and if the plaintiff fails in either of these requirements, your verdict shall be for the defendant. The acts of negligence charged are the failure to provide a reasonably safe place to work

and a failure on the part of the defendant to provide the plaintiff with a reasonably safe appliance to work with and a failure on the part of the defendant to provide the plaintiff with an implement that had been inspected and reasonably repaired, if required. So far as the proximate cause of the injury is concerned, that will be defined to you later. [218]

You are instructed that a person cannot be held liable for an injury without substantive proof that it was caused by negligent acts of his. The burden of proof in this respect is upon the plaintiff in this case, and unless you believe from a preponderance of the evidence that the plaintiff's injury occurred in the manner alleged in the complaint as a direct and proximate consequence of the alleged negligent act or acts of the defendant, your verdict should be for the defendant. If you find that the manner in which the injury was incurred is not established by the evidence, your verdict should be for the defendant.

Clifford Gilbert, the plaintiff, has brought this action against the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for damages for personal injury which Gilbert alleges were proximately caused by the negligence of the railroad company, while he, Clifford, was engaged in intrastate commerce as a servant of the railroad. As I say, there seems to be no controversy upon that point, that he was so engaged. The railroad com-

pany has denied that it was guilty of any negligence which proximately caused injury to Gilbert. On this issue the burden of proof is placed by law on the plaintiff to prove his case by a preponderance of all the evidence, taking that of plaintiff and defendant together, before he can recover; that is to say, if the evidence is evenly balanced or preponderates in favor of defendant on this issue, your verdict must be for the defendant. The railroad company has asserted in its answer that if Gilbert was injured, as alleged in his complaint, it was due to some risk which he assumed or is held by law to have assumed. The defense of assumption of risk is in affirmative defense, which means, gentlemen of the jury, that the burden is upon the defendant in this case to prove that defense by a preponderance [219] or the greater weight of the testimony. Whenever a plaintiff in such a case as this proves by a preponderance of the evidence that he has been injured through some negligent act of the defendant, then the burden has shifted, and in order to defeat the plaintiff's claim by a plea of assumption of risk, the defendant, that is, the railroad company here, must prove by a preponderance of the testimony that plaintiff did assume, in fact or in law, the particular risk which caused the injury. And if the evidence is evenly divided on this issue or preponderates in favor of the plaintiff, that is, Gilbert, in this case, then your conclusion and verdict on this issue must be in favor of the plaintiff and against the railroad company; and, in such event, you must find that

Gilbert did not assume the risk which caused his injury. The railroad company has, in its answer, asserted that Gilbert was guilty of some negligent act which contributed to his injury. I wish to state, Mr. Maury, for the record, that I have stricken from this instruction, Plaintiff's 1, certain words. If at the conclusion of the charge you wish to object to that striking, you will be given an opportunity. The railroad company has, in its answer, asserted that Gilbert was guilty of some negligent act which contributed to his injury. That question is for your decision. If you find that Gilbert did do some negligent act or omitted to take some ordinary precaution, and such contributed to his being injured through the negligence, if any, of the defendant, that fact does not prevent Gilbert's recovering in this action. Such contributory negligence, even if proven, only goes in reduction of damages, as hereafter explained. The burden of proof as to the issue of contributory negligence is on the railroad company here. That burden, throughout the case, is to prove by a preponderance or the greater weight of the testimony. Un- [220] less you find from a preponderance of all the evidence that Gilbert did commit some act or omission of a negligent nature, and that such was a proximate cause of his injury, you will find this issue in favor of Gilbert and against the railroad company.

If, under the law as I have given it to you, and evidence, your verdict is in favor of Gilbert and against the railroad company, it will be your duty

to assess Gilbert's damages and write the amount of your verdict for him. In arriving at the amount of damages that you should award Gilbert, if your verdict is for him, you must fully and fairly compensate him for such loss, if any, as the injury has caused him, and then, if he were guilty of any contributory negligence, the amount of damages shall be diminished by the jury in proportion to the amount of negligence attributable to Gilbert. In determining the amount of damages without diminution—and in this case the evidence may convince you that there should be no diminution (there should be none unless you find it appears by a preponderance of the evidence that the plaintiff was guilty of some act of neglect which directly contributed to the injury that he suffered)—if your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present, or will, with reasonable probability exist in the future, and you should allow for any loss of capacity to earn money caused by the injuries, whether part, present, or with reasonable probability will exist in the future. In this connection you may consider his expectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss as [221] determining what amount would be required to buy an annuity for life, equal

to the loss, with some responsible life insurance company. Gilbert has sued for $25,000. This sum claimed must not be to you any criterion of the amount of your verdict, if for him, but your verdict must not be in any event in excess of $25,000. In this court no verdict can be reached unless all twelve of the jury agree to it.

It is a duty required by law of the master, whether the master is a corporation or an individual, to use reasonable care to furnish for the servant appliances for use in the work of the master which are reasonably safe and ordinarily free from danger, and in the absence of notice or knowledge to the contrary the servant may presume that the master has done its duty in this respect. At this place I want to tell you, gentlemen, that the law is that an employee has a right to presume that his employer has used reasonable care to provide him with a reasonably safe place in which to work and with reasonably safe tools and appliances with which to work. The employee is not required, as a matter of law, to inspect the tools and determine for himself that they are not reasonably safe for the use that he is to put them to. He has a right to start with the presumption that the tool or appliance is reasonably safe for the use that it is intended to be put to, and that the place where he will be required to work is reasonably safe for him to work in. The master is under a duty of giving a reasonable inspection for danger in an appliance before

ordering a servant to use the same, if there is anything about the appliance which is known to the master or which would be known by a man of reasonable prudence and which would cause a reasonably prudent person to believe the appliance was dangerous to be used by the servant. Now, as a necessary incident of furnishing a reason- [222] ably safe place to work and a reasonably safe tool or appliance with which to work, the duty is upon the master, first, to use reasonable care for the purpose of determining that the place the man is to work or the appliance or tool with which he is to work is in a reasonably safe condition for use by him. That is a continuing duty, which means that the defendant cannot escape liability merely because he has once used reasonable care to put the place where the work is to be done or the appliance or tool with which it is to be done in a reasonably safe condition for use. It is the master's duty to inspect, and where it appears reasonably to be needed for the safety of the men working in the place where the work is done or with the appliance or tool with which the work is done, to repair wherever there is danger, or it may reasonably be said that the place or the instrument or tool is not reasonably safe for the use that it is intended to be put to. Now, that is the theory of the case: the first cause of action, a failure on the part of the defendant to furnish a reasonably safe place, tool and appliance; and, secondly, a failure to in-

spect for the purpose of determining whether the then condition of the place, instrument or appliance were dangerous to the man operating the instrument or appliance.

You are charged, gentlemen of the jury, that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict. And, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the parties, the evidence offered should be viewed with distrust. This, in simple language, means just this: if one party has the means of producing a thing in evidence and fails to produce it, [223] the presumption is that it would be against his contention in the event that it were produced. Now, gentlemen, digressing for a minute, there is some contention apparently in this case which might cause one to believe that the defendant has an idea that Exhibit 1 was broken from the Exhibit 3 of the defendant at some date later than the date of the injury. I wish to suggest this for your consideration: the testimony shows, as I see it, that at the time of the injury to the plaintiff in this case that fan was in the control and possession of the bosses for the defendant at its shops in Deer Lodge. Clifford Gilbert never got near that fan again until it was brought into court here. He left in the care of the

first aid man to go to the doctor's office, and, so far as the testimony shows, he never went back. The defendant's witnesses state that the broken parts of the fan were removed from the radiator, or the race, as they call it, and that they were put in a sack by the agents of the defendant corporation. They further tell you, gentlemen of the jury, that that sack was put in the machine shop of the defendant at Deer Lodge and that its contents remained there in the possession of the defendant and its agents until, if you take that view of the testimony of the defendant's witnesses, two of whom I believe to have so testified, they gave that sack and its contents to Mr. Neumen, the claim agent. He denies that they gave it to him. However, Mr. Neumen says that a box was sent to him. The station agent in Butte, I believe, stated upon the witness stand that that box remained upon a shelf and in his possession for a period of six or seven months, and that after it had remained there for that period the master mechanic, as I recall it, or general superintendent, perhaps, directed that there be a cleanup made, and that the carton containing this Exhibit 3, the fan, was taken [224] down by someone who was assisting for the purpose of throwing it into a car into which the refuse was being thrown by the defendant's agents, and that the carton broke and that the agent noticed that it contained a fan and that it was the fan in evidence here as Defendant's Exhibit 3, and that upon

making that observation he again put that fan upon the shelf, where it remained until Leslie Neumen came and took it. Now, you can consider those facts and decide whether there is any chance or possible reason for concluding that the Exhibit 1 is not a part of that fan or that it was broken from the fan at a time later than the injury to plaintiff here. The instruction that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust, is evidently requested for the purpose of calling your attention to the fact that the parts needed to complete this fan are not produced, and the further fact that the photographs of the fuzz said to have been upon that cross member were not produced here, or that the photographs of the finger-prints said to be upon one of those leaves or cross members were not produced here. In arriving at a decision in the case, gentlemen, you have a right to consider all the facts and circumstances. The fact is that they did take photographs on behalf of the defendant and they produced them here in evidence as Exhibits, I believe, from four to seven. I am not certain as to the numbers. But they did not take a photograph of the finger-prints and they did not take a photograph of the fuzz, so far as you and I are concerned. It appears, and you will also note, that at that time the plaintiff here was under a doctor's care with

a finger off and another crushed, and a hand hurt, and was not in possession [225] of the machine so he could make any examination of any kind which would enable him to contradict these statements of the defense. It appears that soon after young Gilbert was injured pieces broken from this fan in evidence were collected by servants of the railroad and delivered to one Leslie Neumen, a claim agent of the railroad, who was said by a witness for the railroad to have been present in court here during this trial. Those pieces have not been presented in evidence for your inspection, and the statement was made by one of defendant's witnesses that they would not be presented in evidence. You may draw your own conclusions from such conduct as to whether those pieces of the fan, if shown to you, would have convinced you that some contention of the railroad defendant was false, or convinced you that statements of the plaintiff, Gilbert, were confirmed by the physical facts. In that connection, gentlemen, you recall that Mr. Neumen was called to the witness stand and that he made an explanation; and I charge you that as to that part of the testimony you may believe his explanation to be credible or you may believe it to be incredible. It is for you to determine.

You are charged, gentlemen of the jury, that an ordinary man of twenty years of age in the north temperate zone of America, according to the American mortality tables, has an expectancy that he will live more than forty years.

Now, gentlemen, in arriving at a conclusion in a case it appears to me that there are other principles of law that should be called to your attention. Those principles relate to the weight and effect of testimony and the manner in which you shall determine the effect of the evidence here.

Evidence is the means sanctioned by law for the proving of a fact, but in proving facts the law does not require demonstra- [226] tion, for such a degree of proof is rarely possible. All that it requires is that the plaintiff here shall produce evidence which reasonably causes you to believe that he was injured at the time and in the manner alleged and as a proximate cause of some act of neglect on the part of the defendant in the case. These facts may be proven by evidence which is either direct or indirect It may be by the statements of witnesses in court, or it may be by the presentation of physical objects to the view and consideration of the jury.

The direct evidence in this case shows to me that there is little conflict in the testimony of the witnesses given from the witness stand as to the condition of the truck, as to its age, as to the fact that it would heat and when heated it would not operate properly, and as to many other matters. There is no conflict as to the fact that the machine was an old machine. That was testified to by Gilbert for the plaintiff, who said he knew the truck in 1923, that it was given to the city of Deer Lodge by the State Highway Commission twelve years ago, that it was used for three or four years in Deer

Lodge after it reached that point and was put out of commission because it would not work. William Arthur drove the truck involved for two months in the spring of 1932. He said it was an old Mack truck. Sears, the master mechanic for the defendant company at Deer Lodge, said the truck involved here was an old army truck Albert Schurman, who drove the truck for three days before the accident at the defendant's request, said it was a 1915 model. Now, that is one of the facts you have a right to consider—whether the truck was reasonably fit for the use that it was to be put to, and whether it was reasonably to be required of the defendant that it examine the truck and make repairs, if repairs were needed. [227]

Now, the fact that the truck was not in very good condition may also appear from the testimony of Gilbert, who said, as I recall his testimony, that when that truck was taken down to the Milwaukee and delivered to the agents of the Milwaukee Railroad it had to be towed. It apparently would not go on its own power. Then the testimony of Gilbert and of Arthur and of Schurman is that the truck would not start. You have a right to ask yourselves whether that was a circumstance which might reasonably cause the defendant to believe that it was not safe to operate the truck or that it might reasonably require an inspection and repair of it. Clark Cutler said he used the truck in hauling crushed rock quite a long time, probably three or four months, and that he had to tow it two or three blocks to get it started. Albert Schurman, who drove this

truck for the defendant company at McLeod's request, said that he had trouble in starting it. He also told you he had to tow it. Then Gilbert told you that the gears could not be shifted. So you have a truck that would not start without being towed and in which the gears could not be shifted. You can ask yourselves if those are facts that would cause one reasonably to make an inspection to determine whether the truck was safe to use. I imagine if the wheels on a locomotive stuck someone would consider it time to inquire into the condition of the locomotive.

Then we find from the testimony of the plaintiff's witnesses and the testimony of the defendant's witnesses that when the fan rotated it would grind and knock. There seems to be no controversy about that. Now, it is for you to say what reasonably might cause that grinding and knocking and whether it would reasonably be proper to require the defendant in the case to inspect it and find out what caused it. There is no controversy that the [228] motor heated. William Arthur and Clark Cutler, the plaintiff's witnesses, and Albert Schurman, the defendant's witnesses, all said that it did heat. Clark Cutler said that the belt broke. Arthur said that he drove the truck two months in the winter of 1932 and that the fan belt broke while he was driving the truck. Clark Cutler said that he drove the machine in 1933 and that the belt broke and he could not figure out what caused it to break. Now, gentlemen, those are facts that you have a right to consider in determining the issues in this case.

Now, as I say, the duty is upon the defendant to use reasonable care to furnish the plaintiff with a reasonably safe place in which to work and to use ordinary care to provide him with reasonably safe tools and appliances at all times during the course of his work. If the testimony shows that the defendant has failed to do that and that as a proximate result thereof the plaintiff was injured, you should find for the plaintiff, unless the affirmative defenses are shown.

The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which it would not have occurred.

Now we come to the affirmative defenses set out in the answer. The defendant alleges that the plaintiff was guilty of contributory negligence. The effect of that negligence, if any, is fixed by the statute of this state, and as a result of that statute contributory neglect does not bar recovery. Contributory neglect is a failure to do what a reasonably careful person would do under the circumstances of the situation which resulted in injury to him. Now, you may ask yourselves, Is there anything to show that the plaintiff in the case did anything which a reasonably prudent man would not ordinarily have done under a like [229] situation? The presumption is that he used reasonable care for his own safety. That presumption may be overcome by the facts in the case, as seen by you; but we have a witness for the defendant in the case who said that he had done the identical thing that

the plaintiff did. So you may ask whether there is any real reason to believe that there was contributory neglect on the part of the plaintiff in the case. But whether there was or was not, the statute says that, "In all actions hereafter brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this act, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

With reference to the assumption of risk the statute provides that, "An employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer"; which merely means that he does not assume any risk growing out of a failure on the part of his employer to do anything that a reasonably prudent man would have done to provide him with a safe place to work or with safe tools or appliances to work with.

Now, it appears again, gentlemen, from the statements in the pleadings here which seem to be admitted, that the plaintiff in the case was at the time of this injury less than twenty-one years of age. That is an element which you have a right to consider, for this reason: that until they reach maturity they are not considered in law to be able to provide or care for themselves; [230] and where

one sees fit to hire an employee under twenty-one years of age, it is his duty to exercise a greater degree of care and caution for the protection of that employee than it would be if one were hiring a man of mature years, who knew, could see, and could understand with reference to ordinary risks and the assumption of risks. The rule is that the nature elements of the doctrine of assumption of risk, as applied to employees of intrastate carriers under the Montana law regulating railroad business, have been well established in a series of controlling decisions.

Now, these assumed risks are of two kinds, ordinary and extraordinary.

Ordinary risks are those that are known to be incident to the occupation in which the employee voluntarily engages; that is, the things that no degree of care and caution can prevent the existence of. We all know that a man working on a railroad line is in a place of danger from the time he starts until he finishes. They are things that cannot be controlled by the force of man. Those things that a man cannot control and that a man going into the employment assumes as a part of his employment are the ordinary risks. An employee is presumed to have knowledge of such risks and to assume the risk of injuries therefrom. Such ordinary risks are assumed by an employee, whether he is actually aware of them or not. They exist in the business and they cannot be taken out of the business; they are there. It is just too bad, but no one

can help it. And it is presumed that the dangers and risks normally necessary and incident to his employment are taken into consideration in fixing the rate of pay.

But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the carrier to exercise [231] due care with respect to providing a safe place to work and safe and suitable appliances with which to work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming those extraordinary risks arising from defects due to the negligence of the employer, unless he has knowledge of them and of the dangers arising therefrom. You will note there, gentlemen, that mere knowledge that there is a defect in the machinery does not bar recovery unless it be further shown that the danger incident to the known condition was appreciated by the person who was injured, and particularly so where the person who suffers the injury is under the age of twenty-one years, or a minor, as we call him. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has knowledge of them and the dangers arising from them or unless the risk and danger are so obvious that an ordinarily prudent person under similar circumstances would have known the risk and appreciated the danger.

Now, gentlemen, one question for you to solve is this: Did the defendant use reasonable care to provide the plaintiff with a reasonably safe place in which to work and with reasonably safe appliances or tools to do the work? If you answer that question in the negative, you should find your verdict for the plaintiff, on the third cause of action.

Another question to be decided by you is this: Did the defendant in the case use that degree of care and caution, with reference to the making of inspections and repairs of the machine employed in this case, which a reasonably prudent person would have used under the same or similar circumstances? If you find that [232] the defendant did not do that, your verdict should be for the plaintiff on the fourth cause of action.

On the other hand, if you find from the evidence here that the plaintiff should recover and also that he was guilty of contributory neglect, that is, that he failed to use that degree of care and caution which a reasonably prudent person under the same situation would have used, and that because thereof he was injured, you may diminish the amount of plaintiff's recovery; but you cannot deny to him recovery in some amount that you deem proper.

If, on the other hand, you should find that the risk of injury such as the plaintiff suffered was one which no foresight or no degree of care and caution on the part of the defendant in this case could prevent, then you will find that the plaintiff assumed

that risk. But if you find from the evidence in the case that the risk was not open and obvious, that it was not such that he must appreciate it, and that it was such that reasonable care and caution on the part of the defendant in the case could have done away with, your verdict must be for the plaintiff so far as the assumption of risk theory is concerned.

Now, the failure to provide a reasonably safe place and appliance and the failure to make the necessary inspection and repair are alleged by the plaintiff in the case, and the burden is upon him to prove these allegations by a preponderance of the evidence. Contributory negligence on the part of the plaintiff, proximately causing the injury, is an affirmative defense which the defendant is required to allege and prove by a preponderance of the evidence. There the burden shifts. That also applies to the so-called defense of the assumption of risk.

Now, gentlemen, when you retire you will elect one of your [233] number foreman. When you arrive at a verdict the verdict will be signed by the foreman and he will return it into court.

Mr. GARLINGTON: If the Court please, the defendant takes the following exceptions to the Court's charge in the instructions to the jury at the conclusion of the arguments in the case:

The defendant excepts to the charge and instruction of the Court given in connection with the defendant's instructions three and four, wherein the Court said in substance that it was not necessary that the acts resulting in the injury be foreseen exactly as they happened, but the Court did instruct that the conditions must be such that some injury might result to someone if an effort were made to use the truck. Our objection to that is upon the ground that it requires the defendant to foresee any injury from any cause whatever, whereas, under the allegations of the complaint, the defect was only in the fan and the duty would be to foresee some injury from a defect or failure in the fan.

The COURT: The objection is overruled. You may have an exception.

Mr. GARLINGTON: The defendant further excepts to the charge of the Court in that it was stated that the witness Albert Schurman had made no examination of the fan——

The COURT: Did I make such a statement, that Albert Schurman had made no examination of the fan? My recollection of it is that he examined the pet-cocks and the ignition system, and said that he had not been able to make a further or complete examination without taking the machine down and taking it apart.

Mr. GARLINGTON: I believe those are the words of the Court; [234] and, as we recall the testimony of the witness Schurman, he testified that

he examined the fan, but that any further examination would have to result in the truck being taken apart.

The COURT: The jury are further instructed that the witness Schurman testified that he inspected the truck after he had made the first trip; that the radiator was getting warm and he examined the fan belt; that there was no wobble and little end-play; that he looked at the magneto and wiring and they were o. k.; that he could make no further inspection without taking down the machine and taking it apart.

Mr. GARLINGTON: We withdraw our objection. The defendant further excepts to the Court's charge and instruction to the jury wherein the Court directs the jury, among other things, to consider the expectancy life of the plaintiff and his earning capacity and the probable cost of the purchase of an annuity, on the ground that there is no evidence in the record of the earning capacity of the defendant, and that such items would not properly be considered by the jury in determining the damage, if any, suffered by the plaintiff.

The COURT: Let the record show that the instruction with reference to the expectancy of life was given pursuant to an agreement between Mr. Maury, of counsel for the plaintiff, and Mr. Murphy, of counsel for the defendant, as the statement of a correct legal principle.

Mr. MURPHY: Yes; but objected to simply as not applicable here. The legal principle is correct.

The COURT: Very well. The objection is overruled and an exception granted.

Mr. GARLINGTON: We further except to the giving of Plain- [235] tiff's instructions numbered 1, 2, 4, and 6, as given by the Court, and to each of said instructions separately, for the reason that they do not correctly state the law applicable to the evidence and the issues in this case.

The COURT: These objections are overruled and an exception is granted.

Mr. MURPHY: I think there is one exception that we desire that may have been included in the one to which we already have an exception, and that is the action of the Court in submitting to the jury the question of the loss of earning capacity on the part of this plaintiff, for the reason that there is no proof of his earning power prior to, at the time of, or after the accident.

The COURT: Yes; the testimony shows, Mr. Murphy, that he had worked prior to the accident and earned six or seven dollars a day, and that at the time of the accident he was working at a wage, I think, of $5.25 or $5.50 a day; that he had prepared himself to go into a garage there at a wage of six or seven dollars a day. And it seems to me obvious that where a man has lost the third finger of his right hand and has practically lost the little finger (it is an encumbrance rather than a help) that the jury may consider the reduction in his earning capacity. They do not hire one-armed mechanics.

Mr. MURPHY: We except to the statement of the Court as to the earning capacity of the plaintiff.

The COURT: That is simply my opinion. I have no desire to control your decision as to any fact. I am merely stating to you the testimony as I recall it and you can determine what the facts really are. The facts [236] are for you, and the law is for me.

(Plaintiff's instructions numbered 1, 2, 4, and 6, referred to by counsel for defendant in his objections to the Court's charge to the jury, are as follows:)

1.

Clifford Gilbert, the plaintiff, has brought this action against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for damages for personal injury which Gilbert alleges were proximately caused by the negligence of the railroad company, while he, Clifford, was engaged in intrastate commerce as a servant of the railroad.

The railroad company has denied that it was guilty of any negligence which proximately caused injury to Gilbert. On this issue the burden of proof is placed by law on the plaintiff to prove his case by a preponderance of all the evidence, taking that of plaintiff and defendant together, before he can recover; that is to say, if the evidence is evenly balanced or preponderates in favor of defendant on this issue, your verdict must be for the defendant.

The railroad company has asserted in its answer that if Gilbert was injured, as alleged in his complaint, it was due to some risk which he assumed or is held by law to have assumed. The defense of assumption of risk is an affirmative defense.

Whenever a plaintiff, in such a case as this proves by a preponderance of the evidence that he has been injured through some negligent act of the defendant, then the burden has shifted and in order to defeat the plaintiff's claim by a plea of assumption of risk the defendant, i. e. railroad company here, must prove by a preponderance of the testimony that plaintiff did assume in fact, or by law, the particular risk which caused the injury: and [237] if the evidence is evenly divided on this issue or preponderates in favor of plaintiff, i.e. Gilbert, in this case, then your conclusion and verdict on this issue must be in favor of the plaintiff and against the railroad company and in such event you must find that Gilbert did not assume the risk which caused his injury.

The railroad company has, in its answer, asserted that Gilbert was guilty of some negligent act which contributed to his injury. That question is for your decision. If you find that Gilbert did do some negligent act or omitted to take some ordinary precaution and such contributed to his being injured through the negligence, if any, of the defendant, that fact does not prevent Gilbert's recovering in this action; such contributory negligence, even if proven, only goes in reduction of

damages, as hereafter explained. The burden of proof as to the issue of contributory negligence is on the railroad company here. Unless you find from a preponderance of all the evidence that Gilbert did commit some act or omission of a negligent nature, and that such was a proximate cause of his injury, you will find this issue in favor of Gilbert and against the railroad company.

2.

If, under the law, as I have given it to you, and evidence your verdict is in favor of Gilbert and against the railroad company it will be your duty to assess Gilbert's damages and write the amount of your finding for him into the verdict.

In arriving at the amount of damages that you should award Gilbert, if your verdict is for him, you must fully and fairly compensate him for such loss, if any, as the injury has caused him and then, if he was guilty of any contributory negligence, the amount of damages shall be diminished by the jury in propor- [238] tion to the amount of negligence attributable to Gilbert. In determining the amount of damages without *diminishment,* and in this case the evidence may convince you that there should be no *diminishment,* if your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present or will, with reasonable probability, exist in the future, you should allow for any loss of capacity to earn money caused by the injuries whether past,

present or with reasonable probability will exist in the future. In this connection you may consider his expectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss, as determining what amount would be required to buy an annuity for life equal to the loss with some responsible life insurance company.

Gilbert has sued for $25,000.00. This sum claimed must not be to you any criterion of the amount of your verdict, if for him, but your verdict must not be in any event in excess of $25,000.00.

In this court no verdict can be reached unless all twelve of the jury agree on it.

4.

You are charged gentlemen of the jury that evidence is to be estimated not only by its intrinsic weight but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore

That if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was [239] within the power of the party, the evidence offered should be viewed with distrust. It appears that soon after young

Gilbert was injured pieces broken from this fan in evidence were collected by servants of the railroad, and delivered to one Leslie Neumen, a claim agent of the railroad, who was said by a witness for the railroad to have been present in court here during this trial; those pieces have not been presented in evidence for your inspection, the statement was made by one of defendant's witnesses that they would not be presented in evidence; you may draw your own conclusions from such conduct, as to whether those pieces of the fan if shown to you would have convinced you that some contention of the railroad defendant was false, or convinced you that statements of plaintiff Gilbert were confirmed by physical facts.

6.

You are charged gentlemen of the jury that an ordinary man of 20 years of age in the north temperate zone of America, according to the American Mortality Tables has an expectancy that he will live more than forty years.

The COURT: At the request of the parties the pleadings are given to the jury. Let the record show that by agreement of the parties and at their request in open court, the Clerk is authorized and directed to see that the exhibits in the case are delivered to the jury in their jury-room.

(Thereupon, the jury retired to consider of their verdict, and subsequently returned into court their verdict in favor of the plaintiff and against the defendant, [240] which verdict is in words and figures as follows:)

[Title of Court and Cause.]

VERDICT

We, the jury in the above entitled cause find our verdict in favor of the plaintiff, Clifford Gilbert, and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we do hereby assess the amount of plaintiff's damages in the sum of Thirty Five Hundred (3500.00) Dollars.

(Signed) George Priest
Foreman of the Jury

(Filed October 1, 1935)

[Title of Court and Cause.]

JUDGMENT

This cause and action came regularly on for trial on the 27th, 28th, and 30th days of September, A. D. 1935, before the Court sitting with a jury, the plaintiff appearing in person and by his attorneys, H. L. Maury, Esq. and T. J. Davis, and the defendant appearing by its attorneys, William Murphy, Esq., and J. C. Garlington, Esq.

Witnesses on the part of the plaintiff and defendant were sworn and on completion of the plaintiff's proof and after plaintiff had rested, the defendant submitted evidence in its defense, and at the close of all the evidence and after both parties, to-wit: Clifford Gilbert and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, an-

nounced in open court that they and each of them rested, the Court instructed the jury. Thereupon the cause and evidence was argued by the attorneys for the respective parties and at the close of said arguments the jury retired to consider its verdict, and subsequently returned [241] into open court with its verdict, which said verdict, after the title of the court and cause, was and is in the following words and figures, to-wit:

[After Title of Court and Cause.]

"We, the jury in the above entitled action, find our verdict in favor of the plaintiff and against the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and we assess plaintiff's damages in the sum of $3500.00.

George Priest
Foreman of the Jury."

Now, therefore, by reason of the premises aforesaid, and by virtue of the law, it is ordered, adjudged and decreed, and this does order, adjudge and decree, that the plaintiff, Clifford Gilbert, have and recover of and from the defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, the sum of Three Thousand, Five Hundred Dollars ($3,500.00), together with plaintiff's costs necessarily expended in this action amounting to the sum of Sixty & 60/100 Dollars ($60 60/100).

Dated and entered this 5th day of October, A. D. 1935.

(Signed) C. R. GARLOW,
Clerk.

The Court having, on the 2nd day of October, 1935, by an order duly made and entered herein, granted defendant herein to and including the 30th day of October, 1935, within which to prepare, serve and file its Bill of Exceptions herein;

Now, on this day, and within the time allowed and granted by order of said Court, comes the defendant and presents this, its proposed Bill of Exceptions, and asks that the same be signed, settled and allowed as true and correct. [242]

Dated this 24th day of October, 1935.

MURPHY & WHITLOCK
R. F. GAINES
Attorneys for Defendant.

Service of the within and foregoing Bill of Exceptions by acceptance of a true copy thereof is acknowledged on this 24th day of October, 1935.

H. LOWNDES MAURY
T. J. DAVIS
Attorneys for Plaintiff.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

The undersigned Judge who tried the above-entitled cause hereby certifies that the above and foregoing, by him corrected, is a full, true and correct Bill of Exceptions in said cause and contains all the evidence introduced, proceedings had, and exceptions taken at the trial of said cause, and the

same is accordingly signed, settled and allowed, and ordered filed this, the 3rd day of January, 1936.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Lodged in Clerk's office Oct. 29, 1935, and Filed Jan. 3, 1936. C. R. Garlow, Clerk. [243]

Thereafter, on January 3, 1936, Petition for Appeal was duly filed herein, in the words and figures following, to wit: [244]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the defendant above named, and petitions this court for an appeal herein, and respectfully shows:

I.

That this is an action for damages for personal injury alleged to have resulted to the plaintiff Clifford Gilbert on the 30th day of October, 1933, at which time he is alleged to have been employed by the defendant in intrastate commerce, it being alleged that said injury was due to the negligence of the defendant in the particulars set forth in the plaintiff's complaint. That said action came on for trial in the above named court before the court sitting with a jury. After the introduction of the evidence, the argument of counsel, and the instruc-

tions of the court, the jury returned its verdict in favor of the plaintiff and against the defendant, and judgment upon said verdict was entered in the above named court on the 5th day of October, 1935, said judgment being in the sum [245] of Thirty-five Hundred Dollars ($3500.00), together with plaintiff's costs, taxed at the sum of $60.60.

II.

That the above named defendant Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, feeling aggrieved by the said judgment and the proceedings had prior thereto in said cause, desires to appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and the reasons and grounds for its said appeal are set forth in its assignment of errors filed herewith, all of which said errors were committed in said cause to the prejudice of the defendant.

Wherefore, defendant prays that its appeal be allowed to the Circuit Court of Appeals, for the Ninth Circuit, for the correction of said errors so complained of, and that citation on appeal be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based and rendered, duly authenticated, be sent to the said Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

The defendant further prays that the amount of the bond required by law to be furnished by the defendant upon such appeal for the payment of costs, be fixed by the court, and that said cause may be reviewed and determined, and said judgment and every part thereof reversed, set aside, and held for naught; and for such further relief or remedy in the premises as the court may deem appropriate.

Dated this 3rd day of January, 1936.

R. F. GAINES
Butte, Montana,
MURPHY & WHITLOCK and
J. C. GARLINGTON
Missoula, Montana
Attorneys for Defendant. [246]

State of Montana,
County of Missoula.—ss.

W. L. Murphy being first duly sworn on oath deposes and says: that he is one of the attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the defendant named in the foregoing action; that he makes this verification for and on behalf of said defendant for the reason that it is a corporation and has no officer within said county where affiant resides. That affiant has read the foregoing petition, knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

W. L. MURPHY

Subscribed and sworn to before me this 3rd day of January, 1936.

[Seal] LILIAN C. WENZEL

Notary Public for the State of Montana. Residing at Missoula, Montana.

My Commission expires Feb. 10th, 1936.

Service of the foregoing Petition accepted and receipt of copy thereof acknowledged this 3rd day of January, 1936.

H. LOWNDES MAURY
T. J. DAVIS
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 3, 1936. C. R. Garlow, Clerk. [247]

Thereafter, on January 3, 1936, Assignment of Errors was duly filed herein, in the words and figures following, to wit: [248]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant above named and makes and files the following assignments of error upon which it will rely in the prosecution of its appeal from the judgment made and entered in the above entitled cause on the 5th day of October, 1935.

1.

The court erred in overruling defendant's motion for a directed verdict made at the conclusion of the testimony.

2.

The court erred in holding that there was any evidence sufficient to go to the jury of negligence upon the part of the defendant in the particulars alleged in the plaintiff's complaint, or at all.

3.

The court erred in holding that there was any evidence sufficient to go to the jury tending to show that any negligence on the part of the defendant was the proximate cause of the [249] plaintiff's injury.

4.

The court erred in holding that there was any evidence sufficient to justify a verdict or support a judgment in favor of the plaintiff and against the defendant.

5.

The court erred in holding that the evidence was sufficient to establish any violation of duty owing from the defendant to the plaintiff.

6.

The court erred in holding that the evidence was sufficient to establish notice to or knowledge of the defendant of the defective condition of the particular instrumentality which is alleged in the plain-

tiff's complaint to have given away or failed and caused the injury to the plaintiff, and that by the exercise of ordinary care the defendant could have discovered the same.

7.

The court erred in holding that the evidence was insufficient to establish that the injury suffered by the plaintiff, if it occurred in any manner alleged in the complaint, was brought about by conditions well known to and appreciated by the plaintiff, and that the plaintiff and his guardian ad litem had full knowledge of the condition and particularly of the defects, if any, of the truck described in the complaint, the danger and risk from all of which was assumed by the plaintiff and his guardian ad litem.

8.

The court erred in holding that there was no fatal variance between the allegations of the plaintiff's complaint [250] and the evidence introduced in support thereof.

9.

The court erred in overruling defendant's objection to the introduction of any evidence in the case upon the ground that the complaint does not allege facts sufficient to constitute a cause of action.

10.

The court erred in overruling the defendant's objection to evidence tending to show the condition of parts of the truck described in the com-

plaint other than the condition of the fan upon said truck, the evidence admitted over the defendant's objection being in substance that the truck was very old, that the fan belt was breaking quite often, that the bearing in the fly-wheel on which the fan belt ran was loose and wobbled, and had a tendency to jump and break the belt on various occasions, that the truck would not start and had to be towed or allowed to run down a hillside, that the radiator boiled whenever the truck was driven more than four or five blocks, that the machinery rotating the fan made a kind of grinding or knocking noise, and that the engine of the truck missed fire. The defendant's objection to said evidence was that the same did not tend to prove the allegations of the complaint as to the specific manner in which the plaintiff received his injury.

11.

The court erred in overruling the defendant's objection to the question asked of the witness C. L. Stubbs on re-direct examination, which question, together with the answer thereto, is as follows: [251]

"Q. What happened in the case of the steel fan to which Mr. Garlington directed your attention?

Mr. MURPHY: I object to it as being entirely immaterial and having no probative force.

A. The fan blade broke off and drove it right through the hood."

12.

The court erred in denying the defendant's offer of proof, which is as follows:

"Defendant offers to prove by defendant's witness Schurman that the defendant operated under certain promulgated safety rules for its employees, and that at the time the truck was received by the defendant from the city of Deer Lodge one of said rules provided:

" 'Don't use tools, appliances or machinery unless they are in safe condition for the work intended, and unless you are familiar with their use.' "

"That when Albert Schurman was assigned to operate said truck one of the conditions of his employment and one of the circumstances under which said truck was operated was that any unsafe condition of the truck for the work intended should result in his ceasing to use it and reporting it to his superiors."

13.

The court erred in overruling defendant's objection to Exhibit 9, consisting of the fan belt, described in the complaint, the objection being that no action of the belt and no condition of it was in any manner connected with or contributed to the injury complained of.

14.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or

in substance in accordance with the following instruction which the defendant requested the court to give to the jury: [252]

"(5) You are instructed that the law presumes that the truck furnished by the defendant to the plaintiff was not defective, and that if the truck were actually defective the law further presumes that the defendant had no knowledge of the defect and was not negligently ignorant thereof. This presumption has the force and effect of evidence on the defendant's behalf."

15.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(6) You are instructed that even though you may find from the evidence that the defendant knew or in the exercise of ordinary care should have known of various defects in the truck, such as its failure to start, its tendency to overheat, the tendency of the motor to miss, etc., yet unless you find from a preponderance of the evidence that the defendant knew or in the exercise of ordinary care under the circumstances should have known that the fan upon said truck was so defective that it could reasonably be anticipated that it would explode and cause injury to the driver of said

truck, your verdict should be for the defendant."

16.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(7) It is admitted in this case that the plaintiff just prior to and at the time of the accident had full control, care and management of the entire automobile truck which is alleged to have caused his injury, and if you believe that the accident arose out of and was proximately caused by the method or manner adopted by him in making adjustments in the motor thereof, or by his negligence or inattention in any respect, and not by the negligence of the defendant as charged, you shall render a verdict in favor of the defendant." [253]

17.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(8) If an employee chooses the more dangerous of the two ways to perform a certain act, he assumes the risk of injury therefrom. Therefore, if you find from the evidence that

the plaintiff could have corrected the condition of the fourth pet-cock on the truck without keeping the motor running, and that it was more dangerous to adjust the same while the motor was running, your verdict should be for the defendant."

18.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(9) The plaintiff was hired by the defendant to serve as a driver of the truck. If you find that the plaintiff's acts in attempting to repair or correct the alleged defective condition or operation of the truck were not a part of his duties and were outside the scope of his employment as a driver, even though they were intended for the defendant's benefit, the defendant is not liable for the injuries received by the plaintiff as a result thereof, and your verdict should be for the defendant."

19.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(10) Where an employee receives for use a defective appliance and with knowledge of

the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used." [254]

20.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(11) Therefore if you find from a preponderance of the evidence that the defendant furnished to the plaintiff a truck in a defective condition, which increased the hazard incident to its use, and the plaintiff was aware of the condition of increased hazard thus brought about, or such condition was so obvious that an ordinarily prudent person of the plaintiff's mechanical skill and personal knowledge and experience with the truck would have observed and appreciated the condition, the plaintiff must be held to have assumed the risk of injury and your verdict must be for the defendant."

21.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(13) The statement in these instructions that the plaintiff must have known and appreciated the danger means simply that he must have known the condition from which the danger arose. Appreciation of danger is conclusively presumed from knowledge of the conditions even though the plaintiff has testified that he did not in fact appreciate the danger. An employee cannot claim ignorance of a hazard which would be obvious to a reasonable and prudent person under the same circumstances."

22.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury: [255]

"(14) One whose duty it is to operate a certain machine is held to a stricter rule of assumption of risk in connection therewith than an employee who has no such duty to operate the machine."

23.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(15) You are instructed that you shall disregard any testimony which you find to

be in conflict with physical facts or the law of nature."

24.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(16) You are instructed that there is no evidence of loss of earning capacity by the plaintiff, and that therefore you may award him no damages for loss of earning capacity as a result of his injury."

25.

The court erred in his instruction to the jury with reference to whether the injury was proximately caused by some act or omission of the defendant, the particular portion of the charge being as follows:

"Now the test to be applied in determining whether the injury was proximately caused by some act on the part of the defendant or some omission on its part is, whether the injury was a reasonably foreseeable event, as the natural and probable consequence of the act or omission, if any, of the defendant or its agent. Now, this does not mean that one reasonably might have foreseen that that truck would stall, or that the plaintiff in this case would be required to leave the position [256]

where he sat in driving the truck and get on the ground and open the hood to try to make some adjustment of the pet-cocks or the motor, or that the fan was going to blow up, if it did blow up, or become jammed and break, if it did become jammed and broke, and that the plaintiff's finger would be cut off. It merely means that the conditions were such that it might be reasonably foreseen that some injury might result to someone if that someone made an effort to use the machine in its then condition. If it were otherwise, a defendant would have a perfect defense in every action preferred against it, because if it were a rail broken or misplaced on the line of a railroad they would say that it was only one rail that was out of line and misplaced or broken, and we could not foresee that that particular rail was going to get broken or that this particular train or person was going to pass over that rail. It comes down to the single thought that an injury may be said to be within the rule of this clause, as I have stated it to you, if it is reasonable to suppose that conditions may arise which will bring about an injury to some person or thing."

Exception was taken to the charge as follows:

"The defendant excepts to the charge and instruction of the Court given in connection with the defendant's instructions three and

four, wherein the Court said in substance that it was not necessary that the acts resulting in the injury be foreseen exactly as they happened, but the Court did instruct that the conditions must be such that some injury might result to someone if an effort were made to use the truck. Our objection to that is upon the ground that it requires the defendant to foresee any injury from any cause whatever, whereas, under the allegations of the complaint, the defect was only in the fan and the duty would be to foresee some injury from a defect or failure in the fan."

The COURT: The exception is overruled. You may have an exception."

26.

The court erred in his instruction to the jury with reference to the inclusion of loss or earning capacity in the measure of damage for plaintiff's injury, the particular portion of the charge being as follows: [257]

"If your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present, or will, with reasonable probability exist in the future, and you should allow for any loss of capacity to earn money caused by the injuries, whether past, present, or with reasonable probability will exist in the future. In this connection you may consider his ex-

pectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss as determining what amount would be required to buy an annuity for life, equal to the loss, with some responsible life insurance company. * * * You are charged, gentlemen of the jury, that an ordinary man of twenty years of age in the north temperature zone of America, according to the American mortality tables, has an expectancy that he will live more than forty years."

Exception was taken to the charge as follows:

"The defendant further excepts to the Court's charge and instruction to the jury wherein the Court directs the jury, among other things, to consider the expectancy of life of the plaintiff and his earning capacity and the probable cost of the purchase of an annuity, on the ground that there is no evidence in the record of the earning capacity of the defendant, and that such items would not properly be considered by the jury in determining the damage, if any, suffered by the plaintiff.

The COURT: Let the record show that the instruction with reference to the expectancy of life was given pursuant to an agreement

between Mr. Maury, of counsel for the plaintiff, and Mr. Murphy, of counsel for the defendant, as the statement of a correct legal principle.

Mr. MURPHY: Yes; but objected to simply as not applicable here. The legal principle is correct.

The COURT: Very well. The objection is overruled and an exception granted.

* * * * * * *

Mr. MURPHY: I think there is one exception that we desire that may have been included in the one to which we already have an ex- [258] ception, and that is the action of the Court in submitting to the jury the question of the loss of earning capacity on the part of this plaintiff, for the reason that there is no proof of his earning power prior to, at the time of, or after the accident.

The COURT: Yes; the testimony shows, Mr. Murphy, that he had worked prior to the accident and earned six or seven dollars a day, and that at the time of the accident he was working at a wage, I think, of $5.25 or $5.50 a day; that he had prepared himself to go into a garage there at a wage of six or seven dollars a day. And it seems to me obvious where a man has lost the third finger of his right hand and has practically lost the little finger (it is a cumbrance rather than a help) that the jury may consider the reduction in his earning capacity They do not hire one-armed mechanics.

Mr. MURPHY: We except to the statement of the Court as to the earning capacity of the plaintiff.

The COURT: This is simply my opinion. I have no desire to control your decision as to any fact. I am merely stating to you the testimony as I recall it and you can determine what the facts really are. The facts are for you, and the law is for me."

WHEREFORE, the defendant prays that said judgment be reversed and said action finally dismissed.

R. F. GAINES
MURPHY & WHITLOCK &
J. C. GARLINGTON,
Attorneys for Defendant.

Copy of the above Assignment of Errors received, and service thereof acknowledged this 3rd day of January, 1936.

H. LOWNDES MAURY
T. J. DAVIS,
Attys for Pltff.

[Endorsed]: Filed Jan. 3, 1936. C. R. Garlow, Clerk. [259]

Thereafter, on January 3, 1936, Order Allowing Appeal was duly filed and entered herein, in the words and figures following to wit: [260]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

The defendant in the above entitled action having heretofore served and filed its petition for an order allowing its appeal from the judgment in said action, and having served and filed its assignment of errors committed therein, and the court now being fully advised with respect thereto;

IT IS ORDERED, that the appeal of said defendant in the above entitled action from the judgment heretofore made, given and entered therein on the 5th day of October, 1935, in favor of the plaintiff and against the defendant, be allowed as prayed for in defendant's petition for appeal filed herein, upon the defendant furnishing good and sufficient security according to law, in the sum of $1000.00, conditioned that said defendant shall prosecute its said appeal to effect and answer all costs if it fail to make its plea good.

DATED this 3rd day of January, 1936.

JAMES H. BALDWIN,
United States District Judge,
for the District of Montana.

[Endorsed]: Filed Jan. 3, 1936. C. R. Garlow, Clerk. [261]

Thereafter, on January 3, 1936, Bond on Appeal was duly approved and filed herein, in the words and figures following to wit: [262]

[Title of Court and Cause.]

UNDERTAKING

WHEREAS, the defendant in the above entitled action has petitioned the above named court for an order allowing its appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit, from that certain judgment entered in the above entitled action on the 5th day of October, 1935, in favor of the plaintiff and against the defendant therein for the sum of $3500.00; and

WHEREAS, the above named court has by its order duly given, made and entered, allowed the said appeal of the defendant upon its furnishing good and sufficient security in the sum of $1000.00 that it, as said appellant, shall prosecute its appeal to effect, and if it fail to make its plea good, shall answer all costs;

NOW, THEREFORE, the undersigned, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, allowed to become surety under and by virtue of the laws of the United States and of the State of Montana upon bonds and undertakings, in consideration of the premises and of the aforesaid appeal, [263] does hereby jointly and severally undertake in the sum of $1000.00, and promise to the effect that said defendant as said appellant will prosecute its appeal in the above

entitled action to effect and, if it fail to make its plea good, shall answer all costs only, not exceeding the said sum of $1000.00.

The undersigned hereby expressly agrees that in case of any breach of any condition of this undertaking the above named court may upon notice to the undersigned of not less than ten (10) days, proceed summarily in the above entitled action in which this undertaking is given, to ascertain the amount which the undersigned as surety upon this undertaking is bound to pay on account of such breach thereof by the defendant, and render judgment therefor against the undersigned and award execution therefor.

IN WITNESS WHEREOF, said corporation has hereunto caused its name to be subscribed and its seal to be affixed by its agent thereunto duly authorized, this 3rd day of January, 1936.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
[Seal] By OSCAR CRUTCHFIELD
Its Attorney in Fact

The foregoing undertaking is approved this 3rd day of Jan. 1936.

JAMES H. BALDWIN,
District Judge.

[Endorsed]: Filed Jan. 3, 1936, C. R. Garlow, Clerk. [264]

Thereafter, on January 3, 1936, Order for Transmission of Original Exhibits to Appellate Court was duly filed and entered herein, in the words and figures following to wit: [265]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.

Upon application of counsel for the defendant in the above entitled action, IT IS HEREBY ORDERED that in connection with the appeal of the said defendant to the United States Circuit Court of Appeals for the Ninth Circuit, all original exhibits introduced in evidence in said cause may be transmitted to the said Appellate Court for its inspection.

DATED: January 3rd, 1936.

JAMES H. BALDWIN,
Judge United States District
Court, District of Montana.

[Endorsed]: Filed Jan. 3, 1936, C. R. Garlow, Clerk. [266]

Thereafter, on January 3rd, 1936, Citation on Appeal was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [267]

[Title of Court and Cause.]

CITATION

UNITED STATES OF AMERICA, to CLIFFORD GILBERT, Plaintiff Above Named, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, California, within thirty days from the date hereof, pursuant to an order filed and entered in the office of the Clerk of the District Court of the United States, for the District of Montana, allowing an appeal from a judgment filed and entered in said court on the 5th day of October, 1935, in favor of the plaintiff and against the defendant in the above entitled action, being at law No. 1622, wherein you are the plaintiff and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, is defendant, to show cause, if any there be, why the judgment rendered against the said defendant as in said appeal mentioned, should not be reversed and corrected and why justice should [268] not be done the parties in that behalf.

DATED: January 3rd, 1936.

JAMES H. BALDWIN,
United States District Judge
for the District of Montana.

Service of the foregoing Citation accepted and receipt of copy thereof acknowledged, this 3rd day of January, 1936.

H. LOWNDES MAURY
T. J. DAVIS
Attorneys for Plaintiff.

[Endorsed]: Filed Jan 3, 1936. [269]

Thereafter, on January 11th, 1936, Praecipe for Transcript of Record was duly filed herein, in the words and figures following, to wit: [271]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO C. R. GARLOW, Clerk of the Above Entitled Court:

Please prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled cause on the 5th day of October, 1935, in favor of the plaintiff and against the defendant, and include therein the following:

The judgment-roll consisting of:

The Complaint.
Demurrer to the Complaint.
Order overruling the Demurrer.
Answer of the defendant as amended.
Reply of the Plaintiff.

Minute entries of the cause on trial.

The Verdict of the Jury.

Order of October 2nd, 1935, allowing thirty days additional time to prepare bill of exceptions.

The Judgment.

Also, the bill of exceptions as settled, allowed and filed.

Also,

Defendant's petition for appeal.

Assignment of errors.

Order allowing appeal.

Bond on appeal. [272]

Order authorizing original exhibits to be transmitted to Appellate Court, and

Original Citation on Appeal.

This Praecipe.

Your Certificate to said Transcript.

You will also please forward with said transcript the original exhibits introduced in evidence in the trial of said cause duly certified by you.

Dated January 7th, 1936.

R. F. GAINES
MURPHY & WHITLOCK &
J. C. GARLINGTON
Attorneys for Defendant.

Service of the foregoing Praecipe accepted and receipt of copy acknowledged this 9th day of January, 1936.

L. C. MYERS,
T. J. DAVIS,
Attorneys for Plaintiff.

[Endorsed]: Filed January 11th, 1936. C. R. GARLOW, Clerk. [273]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing 2 volumes, consisting of 273 pages, numbered consecutively from 1 to 273 inclusive, is a full, true and correct transcript of the record and proceedings, called for by praecipe, in case No. 1622, Clifford Gilbert vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have incorporated into said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the said transcript of record amount to the sum of Forty-six and 45/100 Dollars ($46.45), and have been paid by the appellant.

Witness my hand and the seal of said court at Helena, Montana, this January 24th, A. D. 1936.

[Seal] C. R. GARLOW,
Clerk. [274]

[Endorsed]: No. 8115. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellant, vs. Clifford Gilbert, Appellee. Vol. I. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed January 27, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8115

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

Brief of Appellant

MURPHY & WHITLOCK,
J. C. GARLINGTON,
R. F. GAINES.
Missoula, Montana,

Filed.....1936.

.....Clerk.

MISSOULIAN

United States

Circuit Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and
PACIFIC RAILROAD COMPANY,
Appellant,

vs.

CLIFFORD GILBERT,
Appellee.

Brief of Appellant

MURPHY & WHITLOCK,
J. C. GARLINGTON,
R. F. GAINES.
Missoula, Montana,

INDEX

TABLE OF CASES

STATEMENT OF THE CASE

This is a personal injury case in which defendant appeals from a judgment on a jury verdict in favor of plaintiff. Plaintiff was an employee of defendant railroad but was not engaged in interstate commerce, so that the action is maintained under the State Employers' Liability Act. In all respects material here, the State Act is identical with the Federal Employers' Liability Act.

Appellant's main contention on this appeal is that the trial court should have directed a verdict in favor of defendant. Also specified as error are certain rulings on evidence and instructions to the jury.

The facts are that several days prior to October 30, 1933, plaintiff was employed by defendant to drive a dump truck used in clearing up after a large fire at defendant's shops in Deer Lodge, Montana. The truck was an old, war-time Mack truck, lent gratis to defendant by the City of Deer Lodge for the emergency. It did not run well, and after driving it about three hours on October 30th, plaintiff got out to examine the motor. He saw a pet cock open, next to the whirling, fan, and reached in to adjust it. He contends that by reason of centrifugal force, the fan then exploded and a piece struck his hand, cutting off the fourth finger and injuring the fifth. Defendant contends that plaintiff's version is inherently impossible, and that he simply got his hand into the fan and received his injury. Assuming plaintiff's version of the accident to be true, defendant further contends that the fan's susceptibility to destruction by centrifugal force could not have been discovered

by the exercise of reasonable care on its part, and finally that plaintiff assumed the risk of whatever danger was present.

The foregoing is a birds-eye view of the case as a whole. We will now set out a brief analysis of the pleadings. The first and second counts of plaintiff's complaint, alleging employment in interstate commerce, were dismissed by plaintiff and the court. (Tr. 235). The third and fourth counts are identical, except that they allege employment in intrastate commerce. Defendant does not controvert this.

In the third count plaintiff alleges that he was employed and engaged in driving the truck, and that defendant failed to provide a safe and suitable truck in that it was old, worn, defective, dangerous and unsafe in its then condition, and that defendant negligently failed to repair it or take it out of service. While plaintiff superfluously alleges that the truck was defective in practically every possible respect, the allegations pertinent to the fan assembly are in substance that the axle and bearings were so worn that the fan wobbled, that the cast aluminum fan itself was crystallized, cracked, bent and broken, that in motion the fan would jump around so as to break the fan belt, and that the motor overheated and vibrated. (Tr. 31-32). Finally, plaintiff particularizes very specifically as to how the accident occurred:

> "That while said plaintiff's thumb and fingers were upon said priming cock or pet cock or cup, *the fan upon the engine* of said motor dump truck *became jammed or obstructed and* because of the defective condition herein alleged *suddenly* and violently, and without warning, *exploded, burst, and*

became disintegrated into several pieces, causing said several pieces of the flanges or blades of said fan 3/8 of an inch thick to be thrown and propelled with terrific force and violence through the aperture or opening in front of said fan, which aperture or opening is and was approximately seven or eight inches from the priming cock or cup, on, to, and against the right hand of the said plaintiff, whose right thumb and fingers were then and there touching and adjusting said priming cock or cup or pet cock;" (Italics ours).

In the fourth count, the allegations are the same except that defendant's negligence is alleged to be failure to inspect and examine, and then to repair (Tr. 47). It should be noted specially that defendant is not charged with failure to warn or notify plaintiff, as he knew all about the condition of the truck.

The answer (Tr. 54) is a denial of the negligence alleged, together with a proper plea of negligence on the part of plaintiff, (Tr. 66), of assumption of risk by plaintiff, (Tr. 64), and of the reorganization proceedings in bankruptcy (Tr. 67) in which the defendant became involved June 29, 1935. The latter does not affect the issues of the case on its merits.

The reply (Tr. 71) is simply appropriate admissions and denials of the defendant's affirmative defenses.

With the issues and contentions of the parties thus framed, we may proceed with a more detailed statement of the evidence. Much of the important evidence consists of the broken fan and the entire fan and radiator assembly taken bodily off of the truck. These will be certified as original exhibits for use in consideration of this appeal, and hence a detailed description of them is

unnecessary. Photographs of the truck further clarify the conditions sought to be described.

Plaintiff's astonishing and to us utterly incredible theory requires a very close and minute study of the physical facts shown in the record and by the original exhibits. We say his theory is utterly incredible because we cannot believe, *and the record does not show,* that the physical law of centrifugal force can be bent into a boomerang. That, however, is exactly and precisely what plaintiff does. How he does it will be described in detail later in our brief.

The truck in question is an old, high, war-time Mack of the "bull-dog" type (Tr. 186). Contrary to familiar automobile construction, the radiator and fan assembly separate the motor from the driver's seat, serving as the cowl and dashboard. The radiator consists of circular coils, and the fan rotates inside the circle formed by them. Thus, the coils form a frame encircling the perimeter of the fan. All of this is enclosed in an iron protective frame work, and then mounted in one piece on the truck. The axle or bearing on which the fan rotates protrudes slightly into the driver's compartment in the rear, and into the motor compartment in the front. The axle and the pet cock on the fourth or rear cylinder of the motor are substantially opposite each other and about five to six inches apart (Tr. 96). This is the pet cock plaintiff was attempting to adjust when he was injured (Tr. 118). The fan assembly, except for four supporting crossarms, is entirely open on the front, so that one standing at the motor could see and have open access to the fan as it rotates (Tr. 96). In the event of a slip

or careless movement by one at the motor, there is nothing to keep one's hand from getting directly into the fan.

The fan itself is of cast aluminum alloy (Tr. 196). It has nine vanes, set almost at right angles to the plane of rotation. The vanes are 3/16 of an inch thick, and are bound together on each side at the exterior ends by a continuous band encircling the fan. The material is very brittle (Tr. 196). Since the motor of such a truck cannot exceed 800 or 900 revolutions per minute at top speed, the fan could not revolve at more than 1000 or 1050 revolutions (Tr. 191). The motor idles at 150 to 200 revolutions, and according to plaintiff was running some faster than that when he was injured (Tr. 124). However, the fan probably was not exceeding 500 revolutions at the time. According to the undisputed, uncontradicted testimony, and the *only* testimony on the point, such a metal fan could rotate at more than *12000 revolutions* before breaking from centrifugal force (Tr. 196-7).

At the time of the accident plaintiff was wearing a metal ring on the fourth finger of his right hand, and also had on canvas gloves. As he describes his injury, the flesh was torn away and bone broken on his fourth finger, and the flesh on the little finger was scraped away from the bone for two-thirds its length (Tr. 119-120). Defendant's first-aid man described it as "badly lacerated and looked as though it had been pulled." (Tr. 168). It is to be noted that the wounds were not sharp, clean cuts or lacerations.

After the accident, the fan was found to have four semi-circular pieces broken out of four consecutive vanes

in course of rotation, each at the same point. Then the following vanes are successively more broken. On the right hand cross member of the fan assembly, at a point about opposite the four semi-circular breaks on the fan above referred to, was found a crack or break. Immediately after the accident three witnesses observed light brownish fuzz and a finger mark on the cross member, near the break, the fuzz being the same as on the peculiar gloves worn by plaintiff (Tr. 142; 156; 166).

The foregoing is a brief resume of the principal physical facts produced at the trial. Others will be referred to later, in the course of argument. We will now quote all of the evidence in the record as to how the accident happened. By the plaintiff:

(On direct)

> "That morning about eleven o'clock the truck cylinders started to misfire and the truck began to jerk and heat up and it did not pull as well, so I got out to see what was the matter. I raised the hood and adjusted the carburetor, and in looking over the motor I found the rear priming cup open. The priming cup is used to pour raw gasoline in as an aid to starting the motor. While I was adjusting this the fan, which was six or eight inches from my fingers, broke, cutting off my ring finger. The fan was revolving when it broke and a piece or pieces of the fan struck my fingers." (Tr. 117-118).

(On cross-examination)

> "As to how the accident occurred, I reached for the pet-cock and I was turning it off when something hit my hand and injured it, but as to just what occurred I had not then and do not now have any definite knowledge." (Tr. 129).

(On re-direct)

> "I recall definitely that I did not put my hand into the fan. * * * There is no possibility that I stuck

my hand through those openings and into the fan; and there is nothing in there that I had any purpose in reaching for. * * *

When I was first hurt I knew that the fan had broken, but I did not know just what had happened to it, except that the pieces hit my finger." (Tr. 130-131).

It is at once obvious that this testimony is woefully inadequate to sustain the allegations of plaintiff's complaint. To bolster it he called as an expert one Stubbs, an automobile mechanic of experience. Though he had no experience with trucks or fans of this type, though the fan in question was not described to him, though he never saw or examined it, and though the speed of rotation was not specified, he testified that in the absence of an obstruction a hypothetical fan of some kind would in his opinion have been broken by centrifugal force if it wobbled, hummed loudly, was in an old car and on a worn bearing, and pieces of the fan broke off and flew though the air. Not being connected in any way with the fan in question, this expert evidence, even if it is not otherwise too vague and indefinite, cannot bridge the hiatus in plaintiff's proof.

Accordingly, defendant moved for a directed verdict, specifying the deficiencies in plaintiff's case, but the motion was denied (Tr. 223-225). The jury returned a verdict for $3500.00 in favor of plaintiff.

The individual issues raised on this appeal are stated in our Outline Analysis of Argument immediately following our Specifications of Error.

SPECIFICATIONS OF ERROR

1.

The court erred in overruling defendant's motion for a directed verdict made at the conclusion of the testimony.

2.

The court erred in holding that there was any evidence sufficient to go to the jury of negligence upon the part of the defendant in the particulars alleged in the plaintiff's complaint, or at all.

3.

The court erred in holding that there was any evidence sufficient to go to the jury tending to show that any negligence on the part of the defendant was the proximate cause of the plaintiff's injury.

4.

The court erred in holding that there was any evidence sufficient to justify a verdict or support a judgment in favor of the plaintiff and against the defendant.

5.

The court erred in holding that the evidence was sufficient to establish any violation of duty owing from the defendant to the plaintiff.

6.

The court erred in holding that the evidence was sufficient to establish notice to or knowledge of the defendant of the defective condition of the particular instrumentality which is alleged in the plaintiff's complaint to have given away or failed and caused the injury to the plaintiff, and that by the exercise of ordinary care the defendant could have discovered the same.

7.

The court erred in holding that the evidence was insufficient to establish that the injury suffered by the plaintiff, if it occurred in any manner alleged in the complaint, was brought about by conditions well known to and appreciated by the plaintiff, and that the plaintiff and his guardian ad litem had full knowledge of the condition and particularly of the defects, if any, of the truck described in the complaint, the danger and risk from all of which was assumed by the plaintiff and his guardian ad litem.

9.

The court erred in overruling defendant's objection to the introduction of any evidence in the case upon the ground that the complaint does not allege facts sufficient to constitute a cause of action.

14.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(5) You are instructed that the law presumes that the truck furnished by the defendant to the plaintiff was not defective, and that if the truck were actually defective the law further presumes that the defendant had no knowledge of the defect and was not negligently ignorant thereof. This presumption has the force and effect of evidence on the defendant's behalf."

15.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance

in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(6) You are instructed that even though you may find from the evidence that the defendant knew or in the exercise of ordinary care should have known of various defects in the truck, such as its failure to start, its tendency to overheat, the tendency of the motor to miss, etc., yet unless you find from a preponderance of the evidence that the defendant knew or in the exercise of ordinary care under the circumstances should have known that the fan upon said truck was so defective that it could reasonably be anticipated that it would explode and cause injury to the driver of said truck, your verdict should be for the defendant."

18.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(9) The plaintiff was hired by the defendant to serve as a driver of the truck. If you find that the plaintiff's acts in attempting to repair or correct the alleged defective condition or operation of the truck were not a part of his duties and were outside the scope of his employment as a driver, even though they were intended for the defendant's benefit, the defendant is not liable for the injuries received by the plaintiff as a result thereof, and your verdict should be for the defendant."

23.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

> "(15) You are instructed that you shall disre-

gard any testimony which you find to be in conflict with physical facts or the law of nature."

24.

The court erred in his instruction to the jury in refusing to instruct the jury either in form or in substance in accordance with the following instruction which the defendant requested the court to give to the jury:

"(16) You are instructed that there is no evidence of loss of earning capacity by the plaintiff, and that therefore you may award him no damages for loss of earning capacity as a result of his injury."

25.

The court erred in his instruction to the jury with reference to whether the injury was proximately caused by some act or ommission of the defendant, the particular portion of the charge being as follows:

"Now the test to be applied in determining whether the injury was proximately caused by some act on the part of the defendant or some omission on its part is, whether the injury was a reasonably foreseeable event, as the natural and probable consequence of the act or omission, if any, of the defendant or its agent. Now, this does not mean that one reasonably might have foreseen that that truck would stall, or that the plaintiff in this case would be required to leave the position where he sat in driving the truck and get on the ground and open the hood to try to make some adjustment of the pet-cocks or the motor, or that the fan was going to blow up, if it did blow up, or become jammed and break, if it did become jammed and broke, and that the plaintiff's finger would be cut off. It merely means that the conditions were such that it might be reasonably foreseen that some injury might result to someone if that someone made an effort to use the machine in its then condition. If it were otherwise, a defendant

would have a perfect defense in every action preferred against it, because if it were a rail broken or misplaced on the line of a railroad they would say that it was only one rail that was out of line and misplaced or broken, and we could not foresee that that particular rail was going to get broken or that this particular train or person was going to pass over that rail. It comes down to the single thought that an injury may be said to be within the rule of this clause, as I have stated it to you, if it is reasonable to suppose that conditions may arise which will bring about an injury to some person or thing."

Exception was taken to the charge as follows:

"The defendant excepts to the charge and instruction of the Court given in connection with the defendant's instructions three and four, wherein the Court said in substance that it was not necessary that the acts resulting in the injury be foreseen exactly as they happened, but the Court did instruct that the conditions must be such that some injury might result to someone if an effort were made to use the truck. Our objection to that is upon the ground that it requires the defendant to foresee any injury from any cause whatever, whereas, under the allegations of the complaint, the defect was only in the fan and the duty would be to foresee some injury from a defect or failure in the fan."

The COURT: The exception is overruled. You may have an exception."

26.

The court erred in his instruction to the jury with reference to the inclusion of loss or earning capacity in the measure of damage for plaintiff's injury, the particular portion of the charge being as follows:

"If your verdict is for Gilbert, you should allow for all pain and suffering, if any, caused by the injury, whether such pain has now past, is present, or will, with reasonable probability exist in the future, and you should allow for any loss of capacity to earn

money caused by the injuries, whether past, present, or with reasonable probability will exist in the future. In this connection you may consider his expectancy of life, not as controlling your judgment, but as somewhat enlightening your considerations. If the injury has caused a definite amount of loss of earning capacity, simply multiplying such loss by the years of expectancy is not as accurate a method of valuing the loss as determining what amount would be required to buy an annuity for life, equal to the loss, with some responsible life insurance company. * * * You are charged, gentlemen of the jury, that an ordinary man of twenty years of age in the north temperature zone of America, according to the American mortality tables, has an expectancy that he will live more than forty years."

Exception was taken to the charge as follows:

"The defendant further excepts to the Court's charge and instruction to the jury wherein the Court directs the jury, among other things, to consider the expectancy of life of the plaintiff and his earning capacity and the probable cost of the purchase of an annuity, on the ground that there is no evidence in the record of the earning capacity of the defendant, and that such items would not properly be considered by the jury in determining the damage, if any, suffered by the plaintiff.

The COURT: Let the record show that the instruction with reference to the expectancy of life was given pursuant to an agreement between Mr. Maury, of counsel for the plaintiff, and Mr. Murphy, of counsel for the defendant, as the statement of a correct legal principle.

Mr. MURPHY: Yes; but objected to simply as not applicable here. The legal principle is correct.

The COURT: Very well. The objection is overruled and an exception granted.

* * * * * * *

Mr. MURPHY: I think there is one exception that we desire that may have been included in the one to which we already have an exception, and

that is the action of the Court in submitting to the jury the question of the loss of earning capacity on the part of this plaintiff, for the reason that there is no proof of his earning power prior to, at the time of, or after the accident.

The COURT: Yes; the testimony shows, Mr. Murphy, that he had worked prior to the accident and earned six or seven dollars a day, and that at the time of the accident he was working at a wage, I think, of $5.25 or $5.50 a day; that he had prepared himself to go into a garage there at a wage of six or seven dollars a day. And it seems to me obvious where a man has lost the third finger of his right hand and has practically lost the little finger (it is a cumberance rather than a help) that the jury may consider the reduction in his earning capacity. They do not hire one-armed mechanics.

Mr. MURPHY: We except to the statement of the Court as to the earning capacity of the plaintiff.

The COURT: This is simply my opinion. I have no desire to control your decision as to any fact. I am merely stating to you the testimony as I recall it and you can determine what the facts really are. The facts are for you, and the law is for me."

OUTLINE ANALYSIS OF ARGUMENT

I. The judgment should be reversed, and the action dismissed on its merits, for the following reasons:

   A. Plaintiff's theory of the causation of the injury is not supported by the evidence in three particulars:

      1. The evidence leaves the manner and cause of the happening of the injury purely within the realm of speculation and conjecture.
      2. His theory can only be established by erecting an edifice of three inferences, built one upon the other as forbidden by law.

3. His theory of explosion of the fan by centrifugal force, with ensuing injury to his hand while opposite the center of rotation, is contrary to all the established physical facts and laws in the case.

B. Assuming plaintiff's theory of explosion by centrifugal force to be true, still there is no evidence that by reasonable inspection defendant could have discovered and guarded against this latent and hidden defect.

C. Assuming both the truth of plaintiff's theory and negligence on the part of defendant, still plaintiff was a skilled mechanic and truck driver whose knowledge of the condition of the truck was superior to defendant's, and therefore when plaintiff used it without notice or complaint to defendant he assumed the risk of the danger complained of.

II. The judgment should be reversed in any event, for a new trial, because of the following errors committed at the trial:

A. The court broadened defendant's duty to foresee danger of injury far beyond plaintiff's pleadings, theory and evidence.

B. The court permitted the jury to allow damages for loss of earning capacity, when there was no evidence of loss thereof, and also commented to the jury upon the facts not in evidence.

C. The court refused to submit to the jury defendant's defense that plaintiff went outside the scope of his employment in repairing the truck he was hired merely to drive.

D. The court refused to charge the jury to disregard evidence contrary to physical facts and laws, and that the presumption of law is that there was no negligence on the part of defendant in furnishing the truck to plaintiff.

ARGUMENT

SECTION ONE.

THE CASE SHOULD BE REVERSED AND DISMISSED

I. PLAINTIFF'S THEORY OF CAUSATION IS NOT PROVED. As we have pointed out, plaintiff's theory is that centrifugal force caused the fan to explode and throw a piece of the metal against his hand. We believe that plaintiff carelessly or otherwise got his fingers involved in the whirling fan. That is not our only defense, or the only point we urge on this appeal, but *we are morally convinced that it is the truth as it actually happened.* We believe the physical facts confirm our view to such an extent that the court should have directed a verdict for defendant.

Furthermore, we take it to be self-evident that defendant could not be held liable in this action if plaintiff put his fingers in the fan.

N. Y. Central R. R. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562.

But we can go even a step further. We do not have to assume the burden of establishing affirmatively that the accident occurred as we say it did. It is ample if we demonstrate that plaintiff has not proved by a preponderance of the evidence that it occurred as he alleges it did. The Supreme Court of the United States has clearly laid down the rules that govern cases of this kind, and before

proceeding to analyze the evidence in detail we will refer briefly to some controlling decisions.

In,

Northwestern Pacific R. R. vs. Bobo, 290 U. S. 499, 78 L. Ed. 462,

the court held:

"Our decisions clearly show that "proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

In,

Gunning vs. Cooley, 281 U. S. 90, 74 L. Ed. 720,

the court held:

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

In,

Kern vs. Payne, 65 Mont. 325, 211 Pac. 767,

certiorari denied 261 U. S. 617, 67 L. Ed. 829, the court held:

"To sustain plaintiff's position, therefore, it must be inferred that the coupler on the moving car was closed, and then upon that inference it must be inferred that he went in between the cars to open the closed coupler, both of which inferences must be pre-

ceded by the presumption that he knew the coupler on the standing car was defective and would not operate. One presumption cannot be based upon another presumption. (16 Cyc. 1050; Looney v. Railway Co., 200 U. S. 480, 50 L. Ed. 564-569, 26 Sup. Ct. Rep. 303 (see, also, Rose's U. S. Notes). The inference cannot be drawn from a presumption, but must be founded upon some fact legally established. (5 A. L. R. 1340.)"

In,

Fisher vs. Butte Elec. Ry. Co., 72 Mont. 594; 235 Pac. 330,

the court held:

"To sustain a recovery the evidence relied upon, whether direct or indirect, must be substantial—more than a mere scintilla. (Escallier v. Great Northern Ry. Co., 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458; McIntyre v. Northern Pac. Ry. Co., 58 Mont. 256, 191 Pac. 1065.) A verdict connot rest upon conjecture, however shrewd, nor upon suspicion, however well grounded."

And in,

United States vs. Hansen (CCA 9) 70 Fed. (2d) 231,

the court held:

"Neither court nor jury may credit testimony positively contradicted by physical facts."

Let us now examine the evidence. We have already quoted in full plaintiff's testimony as to how the accident happened. His statement that his hand was on the pet cock when it was struck by a flying piece of the broken fan has absolutely no corroboration whatsoever. *On that one bare statement hangs his whole case.* If it were also unimpeached, his case would be stronger. Unfortunately for him, however, it is badly impeached, entirely aside from the controlling physical facts. First, it is im-

peached by his confession, on the witness stand under fair cross-questioning, that he did not at the time of accident or time of trial have any definite knowledge as to what happened (Tr. 129). Second, it is impeached by the witness Jones, who testified that while taking plaintiff to the doctor plaintiff said that "somehow he got mixed up with the fan," and that "he did not know just how the accident happened." (Tr. 155). Third, it is impeached by the witness Sears, who saw plaintiff the next day, and testified that upon his inquiry plaintiff didn't seem to know just how it happened (Tr. 139). Fourth, plaintiff's credibility is impeached generally by his statement that he got Exhibit 1, a piece of the fan, from the truck thirty days later (Tr. 118), contradicting his father who testified that he personally got it an hour and a half after the accident (Tr. 133), and also that he was present when the truck was first delivered to the defendant (Tr. 122), contradicting his father, who said plaintiff was at home (Tr. 95-96).

From the foundation of a wobbling fan, breaking fan belt, heating and missing motor, humming and grinding fan, together with plaintiff's impeached statement, counsel sought to complete the case by expert evidence from the witness Stubbs. We have already pointed out that Stubbs was an automobile mechanic, experienced only with steel automobile fans which are totally different from the fan in question. Furthermore, he was not shown the broken fan, nor was its general nature even described to him by counsel. Under these handicaps, he was asked hypothetically what would cause a fan to break, and he answered that it would be centrifugal

force (Tr. 114). We think it perfectly obvious that his answer is of no value because of the lacking essential elements of the peculiar type of fan in question. What a steel fan might do in a high speed automobile motor is no proof whatever of what an aluminum fan like this might do. However, the conclusive deficiency in Stubbs' testimony is that counsel gave him *no rotation speed on which to base his answer.* Centrifugal force increases as the square of the rotating speed (Tr. 211). Without rotation, there is no centrifugal force. Therefore, if the speed of the fan's rotation in counsel's question was low enough, Stubb's answer was wrong; conversely if the speed was high enough, Stubbs' answer was right. What was the speed? How could Stubbs tell? How could the jury tell? How can the court tell?

The answer is plain—no one can tell, and his testimony is utterly valueless. With this link missing, plaintiff's case wallows deep in speculation and conjecture. There is no proof whatever that the fan "suddenly * * * exploded, burst, and became disintegrated into several pieces," as alleged in the complaint (Tr. 49). Much more is this true in the light of the uncontradicted testimony of the witnesses O'Neill and Doctor Shue, who after examination of the *fan in question* and with full knowledge of all the facts, stated that centrifugal force did not cause the accident. (Tr. 185-193; 193-212).

Thus far we have considered plaintiff's own evidence, on its own intrinsic merit, and have found it deficient. Now let us see how it is refuted by the immutable physical facts and laws present in this case. If the court will examine the photographs certified as original ex-

hibits, it will be seen that the pet cock plaintiff was adjusting is about five or six inches distant from, and directly opposite, the axle or bearing of the fan. It is a physical law that centrifugal force is directed outward from the center of rotation, and broken pieces of the fan would necessarily fly outward in the plane of rotation. However, in a way entirely unexplained by the evidence, plaintiff contends that the flying piece which struck him traveled *almost directly opposite to centrifugal force.* Thus we say they have tried to bend the law of centrifugal force into a boomerang. The court knows judicially that such a thing cannot be done. It is inherently impossible and incredible that centrifugal force broke that fan and threw a piece in reverse with such force as to cut off plaintiff's gloved finger.

Therefore, we most earnestly submit that plaintiff's impeached and uncorroborated statement, unsupported even by his own expert opinion testimony, must certainly be held as a matter of law to be entirely superseded by the plain laws of nature operating directly to the contrary. It is the legal duty of the court to disregard such a statement, and dispose of the case as though it had never been made. This compels a reversal and dismissal of plaintiff's action.

Not only do the physical facts and laws make plaintiff's theory inherently impossible, but they very closely confirm our belief that plaintiff actually got his fingers into the fan. For example, the form of the breaks on the fan clearly indicate that they were caused by an obstruction. Dr. Shue gives a complete explanation of this point in his testimony at page 197 and 198 of the transcript.

To understand it clearly it is almost necessary to refer to the broken fan itself. A man's finger, wearing a metal ring and being encased in a canvas glove, could form such an obstruction and cause such breaks. (Tr. 208-209).

Furthermore, if centrifugal force operates as plaintiff claims it does, scattering pieces in every direction, there should have been pieces of fan scattered all around the truck. Yet, plaintiff's father and the witness Truscott, visiting the scene very shortly after the accident, saw no pieces in the fan housing itself, and on the splash pan underneath. (Tr. 133-135).

Again, the very top speed of the motor and fan was so far below the minimum at which such a fan could break by centrifugal force that such a thing is out of the question. Top speed of the fan was not over 1050 r. p. m. (Tr. 191), while at idling speed it would be about 250 r. p. m. (Tr. 187). Plaintiff says the motor was more than idling when he was adjusting the pet cock (Tr. 124), but the foot and hand throttles were closed. (Tr. 123-124). As compared to these speeds the minimum speed at which centrifugal force could break the fan is 12,000 r. p. m. (Tr. 197), about twenty-five times faster than the fan was running. These calculations are a matter of physics (Tr. 196). They were not assailed by plaintiff and must be accepted as true. They clearly demonstrate the inherent impossibility of plaintiff's case.

In addition, the very foundation of plaintiff's claim of breakage by centrifugal force is refuted. It is only an inference, at best, that the fan broke from centrifugal force, and this inference is based on the testimony that

the fan wobbled, hummed and broke the fan belt. Through defendant's witnesses Sears, Jones, Hulben and Dennis, its machinists at the Deer Lodge shops, it was proved without contradiction that the fan assembly, now before this court as original Exhibit 2, is in exactly the same condition as it was before the accident, except that a new fan is in place. Machinist Hulben took out the broken fan, and installed a new fan on the same axle, bearing, ball bearings, and sleeve or race on which the old fan rotated (Tr. 179-182). He testified:

> "So, inasmuch as there has been no change in the bearings, the end-play in the new fan is exactly the same as it was in the old fan, and any wobble that might be present in the new fan is exactly the same as it was in the old fan. * * * The conditions in reference to end-play and wobbling now present in the new fan are identical with the conditions present in the old fan at the time I was assigned to take the old fan out and before it was removed."

The court must take this evidence at full face value, since it is unimpeached and uncontradicted in any particular, even though the witnesses are defendant's employees. This is the rule of the Supreme Court.

In,

> Chesapeake & Ohio R. R. v. Martin, 283 U. S. 209, 75 L. Ed. 983,

the court said:

> "And, in consideration of the question (motion for directed verdict) the court, as will be shown is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open

to challenge as suspicious or inherently improbable."

This rule was applied to a master and servant personal injury case in,

Pennsylvania R. R. v. Chamberlain, 288 U. S. 333, 77 Law Ed. 819.

Therefore the court can by personal examination and rotation of the fan in Exhibit 2, determine for itself whether there is any wobble or excessive end-play. It shows no wobble whatever, and rotates freely and truly on its bearing. If it did not, plaintiff and his father, both mechanics, had every opportunnty to examine it in court and testify to a contrary opinion if they had such. Thus, the very basis and foundation upon which plaintiff's case is sought to be erected falls away before the physical facts silently disclosed by Exhibit 2.

Finally, the natural probability of our belief is borne out by related location of the operating parts of the truck. The pet cock was but a few inches from the open, whirling fan. The right cross-arm, on which the fuzz and marks from plaintiff's glove were observed, and which was cracked at a point opposite the semi-circular breaks in the fan, was just on a level with the pet cock and plaintiff's hand. Further, it was separated from the vanes of the fan from 1-3/16 inches near the axle down to 5/8ths of an inch at the point of the break (Tr. 206; 212). Thus it could not serve as a shears to sever a man's finger when caught in the whirling fan (Tr. 206). Rather it would tend to lacerate and pull the flesh away, just as described by plaintiff and witness Zurmuehlen (Tr. 119-120; 168). It would be very easy for a gloved *right* hand

to slip from the handle of the pet cock in a right handed direction a few inches so as to become involved in the fan, and then become lodged between the fan and the right cross-arm. In such position, fortified by a ring and a glove, and held stationery by the cross-arm, the fingers would naturally cause nicks in the vanes in rotation just as they now appear. Therefore we contend that these physical facts and circumstances are all so consistent with our belief, and so inescapably opposed to plaintiff's theory that the court cannot avoid the conclusion that plaintiff was injured by getting his hand into the fan. This conclusion, or the lesser conclusion that the manner of happening of the accident is left to speculation and conjecture, compel a reversal and dismissal of plaintiff's action.

So far in our argument on the sufficiency of plaintiff's evidence and the error of the trial court in denying defendant's motion for a directed verdict, we have confined ourselves strictly to the facts. Now it is appropriate to refer to cases and authorities which support our contention. These will be divided into three groups,—first, to the effect that plaintiff's case rests on speculation and conjecture; second, that it is based upon inferences drawn from other inferences; and third, that it is contrary to controlling physical facts.

(1) The general rule that a case of negligence which rests on speculation and conjecture is insufficient will not be questioned by opposing counsel. Its applicability to this case doubtless will be questioned, however. We realize that this and every case must be determined upon its own peculiar facts, and accordingly that other cases

can rarely be conclusive but rather illustrative and persuasive.

In,

C. M. St. P. Ry. Co. vs. Coogan, 271 U. S. 472, 70 L. Ed. 1041,

a brakeman had been killed by a train which was being made up. There was no eye witness of the accident and the plaintiff's theory was that deceased caught his left foot in a bent air pipe line just outside the rail and in that manner was tripped so that he fell over the rail and was run over. To prove this theory plaintiff relied upon scratches on deceased's left shoe and a rounding depression parallel with the sole and just above the heel. It was also shown that he had been dragged about 15 feet and that it was his duty to go between the cars to couple the air hose. The court reversed a judgment for plaintiff, holding (1st) that when substantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed; (2nd) that the case was built up by inference drawn from inference, and that the marks on the shoe were insufficient to bridge the hiatus in plaintiff's case; and (3rd) that the record left the manner of the accident in the realm of speculation and conjecture.

In,

N. Y. Central R. R. vs. Ambrose, 280 U. S. 486, 74 L. Ed. 562,

the deceased was employed in a grain elevator having large bins with rectangular manhole covers at the top. One of the bins had been filled with poisonous gas to destroy vermin, which decedent knew. He was found dead in the bin with the manhole cover removed and the

electric light in the bin burning. The plaintiff's theory was that a signal had been given for decedent to go into the bin to prepare the spouts, or that while he was sweeping the floor above the bin it was necessary for him to remove the cover, and that in so doing he was overcome by the gas and fell into the bin. The court reversed a judgment for the plaintiff, holding that the verdict rested only upon speculation and conjecture, and that a showing merely that the employer may have been guilty of negligence is insufficient because the evidence must point to the fact that he was actually negligent.

In,

A. T. & S. F. Ry. Co. vs. Toops, 281 U. S. 351, 74 L. Ed. 896,

decedent was a conductor, superintending the switching of a number or cars. There were no eye witnesses, and he was found lying on the track between the rails. Approximately 14 cars in one string had passed over him, and while there were no marks of flesh or blood on the first car, there were such marks upon the south wheels of each of the following cars. The plaintiff's theory was that the roadbed was too thinly ballasted and that there was negligence in making the switch movement without signal, flagmen or lights. The court reversed a judgment for the plaintiff, holding that the jury may not be permitted to speculate whether negligence of the employer was the cause of the injury. The case is particularly interesting because the court placed much reliance upon the physical fact that there were no marks of blood or flesh upon the leading car, which the court considered to render highly improbable plaintiff's theory that de-

ceased was run down by the cars while crossing or standing upon the track. So in the instant case the infallible operation of centrifugal force renders highly improbable plaintiff's theory of his own accident.

In,

A. T. & S. F. Ry. vs. Saxon, 284 U. S. 458, 76 L. Ed. 397,

deceased was a brakeman who was run over by his train. There were no eye witnesses, but plaintiff's theory was that deceased was running along by the side of the track and stepped upon a soft area or hole in his pathway and was caused to fall and be run over. To prove this it was shown that across the pathway commonly used there was a slight depression filled with small rock screenings which was softer than the other portions of the path and yielded to the foot. Just west of this place blood was found upon the rail. A footprint was found in the pathway heavier than most and looking as though someone running had stepped in it. The court reversed a judgment for the plaintiff, holding that there was nothing but conjecture to support the plaintiff's theory and there was no casual negligence on the part of the defendant shown by the evidence.

In,

Pennsylvania R. R. vs. Chamberlain, 288 U. S. 233, 77 L. Ed. 819,

deceased was a brakeman riding a string of cars being switched. Plaintiff's theory was that the cars he was riding were negligently caused to be brought into violent contact with other cars so that he was thrown to the track and run over. Many witnesses testified that there was no such collision, but plaintiff's witness testified that

from a considerable distance away he heard a loud crash, and upon turning saw the two strings of cars together and the deceased no longer visible. He later went to the spot and saw the deceased between the rails. The lower court directed a verdict for defendant, which was reversed by the Circuit Court of Appeals. The Supreme Court reversed the Circuit Court, holding that from the witness' position his testimony that he saw the two strings of cars moving together, was incredible as against the positive testimony of other witnesses to the contrary. The court further held, leaving out this testimony a judgment for plaintiff would rest upon speculation and conjecture.

In,

Northwestern Pac. R. R. vs. Bobo, 290 U. S. 499; 78 L. Ed. 462,

the deceased was a bridge tender, working the night shift. He disappeared, and was found in the water two weeks later. At the time of his disappearance he wore a coat with a sheep-skin collar, and shortly after his disappearance witnesses observed small pieces of wool and blood spots near the edge of the iron platform at the foot of the stairway on the bridge. The steps and platform were smooth and became quite slippery when dew accumulated on them. Plaintiff's theory was that by reason of the negligently slippery steps deceased slipped and fell into the water. The court reversed a judgment for the plaintiff, holding that the plaintiff's case rested upon pure speculation and that there was nothing from which a casual connection of negligence on the part of the defendant might be drawn.

We believe the foregoing cases are valuable for their illustration of the standards to which a plaintiff's case of negligence must conform. Outside of plaintiff's one incredible statement, which the Supreme Court would not hesitate to disregard, the plaintiff's case here depends upon even vaguer inference and speculation than any of the cases cited.

(2) Counsel also will doubtless concede the general rule that a case of negligence may not be made out by building one inference upon another, and then dispute its applicability here. Let us look at the facts again.

There is no direct evidence of explosion by centrifugal force. That is left to be inferred from the wobbling, grinding fan and the flying piece of the fan to which plaintiff testified. Having inferred centrifugal force, is a case made out? No, because normally centrifugal force cannot reverse itself and propel things backward. How, then, did the flying piece come to strike plaintiff's hand? The record furnishes no answer, unless it be a further inference that we have here a very phenomenal type of centrifugal force, or that the piece bounced back on to plaintiff's hand, or that some counter-explosive force intervened to reverse the normal operation of centrifugal force. Is even this enough? No, because it must further be inferred that defendant knew or by ordinary care should have known of the danger of such weird occurrences coming to pass. Therefore, to make out his case plaintiff must spin out three inferences, each based solely and squarely on the next preceding one, and the first based upon what we have already shown to be a physical impossibility under the circumstances. If there

ever is a limit beyond which a plaintiff may not go in personal injury cases, this case surely exceeds that limit.

Comparable cases demonstrate this further. The case closest home is,—

Kern vs. Payne, 65 Mont. 325, 211 Pac. 767. Certiorari denied 261 U. S. 617, 67 L. Ed. 829,

where action was brought for the death of a brakeman on the theory that a coupler on a car was defective, requiring deceased to go between the cars where his foot was caught in a switch frog, and he was thrown upon the track. The court reversed a judgment for plaintiff in the following language:

> "To sustain plaintiff's position, therefore, it must be inferred that the coupler on the moving car was closed, and then upon that inference it must be inferred that he went in between the cars to open the closed coupler, both of which inferences must be preceded by the presumption that he knew the coupler on the standing car was defective and would not operate. One presumption cannot be based upon another presumption. (16 Cyc. 1050; Looney v. Railway Co., 200 U. S. 480, 50 L. Ed. 564-569, 26 Sup. Ct. Rep. 303 (See, also, Rose's U. S. Notes). The inference cannot be drawn from a presumption, but must be founded upon some fact legally established. (5 A. L. R. 1340).

In,

Doran vs. U. S. Bldg. & Loan Association, 94 Mont. 73; 20 Pac. (2d) 835,

plaintiff tripped over a projecting metal nosing on a stair step. The court reversed a judgment for plaintiff, and said:

> "Furthermore, in order for the jury to find the defendant negligent, it would have been necessary for them to have first presumed that the condition testified to continued for a sufficient length of time

to charge the defendant with notice and, having indulged that presumption, inferred therefrom that defendant had notice of this alleged dangerous condition.

From one fact found another may be presumed if the presumption is a logical result; but to hold that a fact presumed at once becomes an established fact for the purpose of serving as a basis for a further presumption or inference would be to spin out the chain of presumptions into the barest region of conjecture. (First National Bank of Glendive v. Sorenson, 65 Mont. 1, 210 Pac. 900; Kern v. Payne, 65 Mont. 325, 211 Pac. 767).

In,

Glasgow Maru (D. C.) 1 Fed. (2d) 503,

contention was made that a ship collided with another ship because of a shoal at the wharf. Proof of the shoal depended upon circumstances from which the existence of the shoal might be inferred. There was no direct evidence as to what caused the collision. The court held that the case was insufficient, saying that without direct evidence that there was a shoal the court was asked to infer its existence from circumstantial evidence, and upon that inference to rest still another inference that the shoaling caused the sheer.

In,

Tucker vs. Traylor Engineering & Mfg. Co. (CCA 10); 48 Fed. (2d) 783,

the buyer of a rock crusher brought action against the seller for damages for fraud, claiming that a defect in the machine had been wilfully concealed by painting over it. The court affirmed a judgment for the defendant, saying in substance that the plaintiff relied upon meager circumstances to arrive at the inference that there was a

defect when the machine was shipped, and that it was not permissible to build upon that inference the further inference that the defendant knew of the defect.

In,

Cardinale vs. Kemp (Mo.) 274 S. W. 437,

plaintiff sued a physician for alleged malpractice. The court affirmed a judgment of nonsuit, saying:

> "The law is well settled that the appellant cannot make out his case by building one inference upon another. In order for him to prevail on the theory of his counsel it would have to be inferred that the scar found upon the eye ball was caused by a cut, and the further inference that the respondent caused the cut; and still further, that the cut caused the loss of the eye. This cannot be done."

A case very closely in point is,

Riggie vs. Grand Trunk R. R. (Vt.) 107 Atl. 126,

Writ of Error Dismissed 254 U. S. 658, 65 L. Ed. 461.

There plaintiff contended that a jack was not reasonably safe because there was sand or gravel between the cogs or teeth thereof. The court held that evidence that the jack had occasionally been thrown into gravel and that gravel sometimes got between the cogs, was insufficient to establish the alleged defect, because this would be basing presumption upon presumption.

(3) We have already discussed the importance and consequence of the physical facts and laws involved in this case. Turning now to the legal side of the question, we can find no authority, except a line of emery wheel cases later to be cited under another point, which is directly in point on its facts. However, the following cases are at least analogous and illustrate how stronger cases

than plaintiff's have been dismissed as at variance with physical facts and laws.

In,

American Car & Fdry. Co. vs. Kinderman, 216 Fed. 499,

plaintiff was an employee working under a car which was run into by an engine. The negligence charged was permitting the engine to be defective and unsafe in that the spring on the throttle was defective so that it could not be stopped quickly. The engineer testified that the spring had become weak and lost its temper and that he had reported it several times. Defendant denied this, and produced evidence showing that the spring had never been changed since the accident, that it worked perfectly immediately afterward when tested, and that it was still in perfect condition at the time of trial. Defendant also showed by experts that such springs usually lasted the life time of the engine and that an additional spring could not be obtained anywhere except from the locomotive manufacturer. The court reversed a judgment for plaintiff and held that the testimony of the engineer was positively contradicted by the physical facts, and a verdict should have been directed for defendant.

In,

Nugent vs. Kauffman Mill (Mo.) 33 S. W. 428,

plaintiff testified that a nail or some other heavy substance fell through a spouting which at the time and just above plaintiff was choked with wheat chaff and mill grindings with such velocity and force and in such a manner as to strike a scoop held in the right hand in such a way as to cause the left hand working above and in-

dependent of the scoop to be knocked downward between crushing rollers. The court held that this testimony so contravened all generally recognized laws of mechanics and philosophy as to require it to be ignored.

In,

Sexton vs. Metropitan Street Ry., (Mo.) 149 S. W. 21,

plaintiff was an electrician in defendant's power house working at a converter where he was burned by an electric "flash-over." His theory was that tar leaked from the roof on to the machine and caused the condition. Impeached testimony of one witness showed that there was tar on plaintiff after the accident but other evidence showed no tar on the machine, and also that tar was a non-conductor of electricity and would have to be destroyed by being reduced to flame before it could serve as a conductor. The court reversed a judgment for plaintiff, holding that the physical and scientific facts were opposed to the theory that the flash-over was caused by the tar.

In,

Larsen vs. N. P. Ry. (Minn.) 241 N. W. 312,

plaintiff fireman was injured when the spindle of a water gauge on the locomotive blew out and struck him on the head. The evidence showed that the spindle was in the same condition at the trial as at the time of accident, and that the threads remaining on the spindle would resist many times the pressure in the boiler although the innermost threads were worn. The court affirmed a verdict directed for defendant, saying:

> "No amount of expert opinion could convince reasonable minds against the visible condition of the

spindle. We therefore conclude that the visible condition and nut are such as to conclusively contradict the opinions of the plaintiff's experts and to demonstrate that the spindle did not blow out. In our opinion reasonable minds functioning judicially could not differ as to that conclusion."

In,

Samulski vs. Menasha Paper Co. (Wisc.) 133 N. W. 142,

plaintiff was injured operating a machine for barking wood. He placed his hand between the casing and the disc for the purpose of changing the knives of the machine, and claimed that while thus engaged, and while the disc was at rest, the drive belt was shifted from the loose to a tight pulley, causing the disc to revolve and injure him. The physical facts show that the drive belt had not and could not have been shifted as claimed, and that the only rational explanation of plaintiff's injury was that he had placed his hand and arm between the casing and the disc before the disc had entirely ceased to revolve by its own momentum after the plaintiff had shifted the drive belt from the tight to the loose pulley. The court reversed a judgment for plaintiff, and said that the testimony of the witness, or finding of a jury contrary to unquestionable physical situations, or common knowledge, or conceded facts, was of no weight in favor of the side it was invoked to support, while it might be successfully impeached by its demonstrated utter improbability or impossibility.

We do not see how a case could be more closely in point on every important feature than the case last above cited.

II. PLAINTIFF FAILED TO PROVE NEGLIGENCE IN ANY EVENT. Up to this point we have attacked plaintiff's case on its own inherent incredibility and insufficiency. Now we propose to attack it on its failure to prove negligence of the defendant if we *assume* that the accident occurred from centrifugal force. We contend that plaintiff has failed to prove that by the exercise of reasonable care defendant could have discovered the latent danger of explosion of the fan through centrifugal force.

The Supreme Court of the United States has defined the duty owed by a master to his servant as follows:

> "The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end."

The Supreme Court of Montana has laid down the same rule:

> " * * * the master is chargeable with the duty only of using reasonable care to provide plaintiff with a reasonably safe and secure vehicle."
>
> Demarais vs. Johnson, 90 Mont. 366, 3 P. (2d) 283.

The court also instructed the jury to this effect (Tr. 267).

Accepting this as the criterion of defendant's duty, does the evidence show any breach of it? Absolutely without contradiction, the following facts appear. As soon as the truck was first received from the City, defendant placed Albert Schurman in charge of it as driver. Schurman is an automobile mechanic and truck driver of ten years experience. His intelligence and ability were not discredited in any way. He testified that he examined the truck carefully when he first began to drive

it, the fan assembly particularly because the motor heated up. He found the fan assembly in good order, no wobble and slight end-play. (Tr. 169-171). Some end-play is necessary to allow free rotation and prevent overheating (Tr. 180). His inspection was as complete as could be made without taking the motor down. Therefore, it appears without dispute that defendant procured a reasonable inspection of the truck to be made by a reasonably competent mechanic, and that no defect or danger of explosion from centrifugal force was observed. Since defendant necessarily must act through employees, this was an adequate and reasonable compliance with its legal duty.

Next, when Schurman left, defendant asked the Mayor of Deer Lodge for an experienced man to drive the truck, and the Mayor put him in touch with plaintiff (Tr. 137). Plaintiff had known the truck for five or six years or more, and had driven it for some time about six months prior to the accident (Tr. 118-119). He and his father knew most about the truck and were most familiar with it of all the persons in Deer Lodge (Tr. 128). In fact, plaintiff completely describes all the alleged defective conditions of the truck from which he claims defendant should have forseen danger from explosion by centrifugal force (Tr. 118-119; 128). Plaintiff drove the truck three or three and one-half days before the accident, (Tr. 122) doing his work regularly and satisfactorily, but at no time did he make any complaint or give any information to defendant about the claimed defective conditions (Tr. 152). Plaintiff alleges in his complaint that he was a skilled mechanic (Tr. 38; 50), and admits in his reply that he was an experienced truck driver (Tr. 73). Thus

it appears that in addition to Schurman's inspection, defendant procured a skilled mechanic and experienced truck driver who was more familiar with the particular truck than any other person in the country except his own father. If that was not exercise of reasonable care by defendant we cannot conceive of the precautionary extent to which the mythical ordinary prudent man would go. These facts are entirely undisputed, coming mainly from plaintiff himself. We submit that they require a ruling as a matter of law that defendant exercised reasonable care.

Finally, to foreclose any possible doubt about the question of reasonable care, we point out that there is absolutely no evidence whatever in the record that the danger of centrifugal force could have been discovered by any degree of care. If a skilled mechanic like plaintiff, thoroughly familiar with the truck, could not foresee any danger of this kind, then certainly defendant cannot be charged with negligence in failing to foresee it. We have already pointed out that plaintiff's witness Stubbs gave no testimony concerning a low speed truck motor and a heavy aluminum fan. Therefore, without repeating that discussion, we may say that there is no evidence that the conditions plaintiff described should charge any one with notice of danger from centrifugal force. If the defect existed it was latent and hidden. Proof of its discoverability is the *sine qua non* of plaintiff's case. Yet it is utterly lacking here. While plaintiff mentions crystallization of the fan in his complaint, this idea was apparently abandoned by him at the trial. At any rate, there is no proof with respect to it.

We therefore submit that plaintiff has failed to show any breach of duty by defendant, even if we assume that the fan really did explode by centrifugal force. If it did, it was simply a fortuitous and unexpected event, arising out of a latent and hidden defect, for which defendant may not be held responsible in damages. For this further reason, the defendant's motion for directed verdict should have been granted, and the case must now be reversed and dismissed.

The general rule that a master is not liable for a latent or hidden defect, not discoverable by ordinary care, will not be questioned by counsel. It is stated well in 39 C. J. 435:

> "The master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which could not be discovered in the exercise of reasonable care and diligence."

The cases most closely in point are several involving exploded emery wheels. An emery wheel of course cannot be compared to a cast aluminum fan, either in composition or use, but the principle of the cases is the same.

The first case is,—

> Bardsley vs. Howard & Bullough Mch. Co., 176 Fed. 619.

The plaintiff alleged that the emery wheel was dangerous, improper, unsafe and liable to burst, because it was run without flanges attached to the side thereof. He proved that there were flanges on the wheel but that they were about half as large as they should have been. The court reversed a judgment for the plaintiff, holding that the variance between no flanges and small flanges was

immaterial but that plaintiff failed because there was no evidence as to what caused the wheel to burst.

The second is:

Rodell vs. Adams (Penn.) 80 A. H. 253,

The plaintiff was a skilled workman with twenty years experience, and selected the emery wheel from stock and placed it on the machine. He claimed that the spindle was too light for the wheel and caused it to vibrate, making the grinding of tools more difficult, but not rendering it unsafe. Plaintiff told defendant of the vibration, but did not state that it was dangerous. The court affirmed a judgment of nonsuit, holding that if plaintiff, a skilled workman, did not consider that the wheel was dangerous, his employer had no reason to believe it so.

The third is:

Saxe vs. Walworth Mfg. Co. (Mass.) 77 N. E. 883.

There an emery wheel being used 10 feet from plaintiff's work, burst and a piece struck him in the head. The wheel was nearly new, and had never been guarded, although a guard might have been used and would have prevented the piece from hitting plaintiff. The court affirmed a verdict directed for defendant, holding that there was no evidence that if the wheel was defective the defect could have been discovered by the exercise of ordinary, or even the highest diligence, and that as the wheel was not guarded when plaintiff was first employed, defendant was not obliged to guard it thereafter.

See, also, Simpson v. Pittsburg Locomotive Works, (Pa.) 21 A. & I. 386.

There are other cases analogous in principle. In,

Great Northern Ry. vs. Johnson, (CCA 8) 207 Fed. 521,

plaintiff was injured by a piece of metal breaking off from a flue upon which he was working. He showed that some of the flues were old, thin, and others crystallized. It also appeared that none of the men had ever known of a piece breaking out in this manner before. The court reversed a judgment for the plaintiff, and held:

> "Considering that the flue upon which Johnson was working was old and brittle, was there evidence of negligence upon the part of the railway company which would warrant the jury in finding a verdict against it? The fact that Johnson was injured as alleged, as between him and the railway company, is no evidence of negligence on the part of the company. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The question then comes to this: How could the railway company have obtained, by the exercise of ordinary care, any knowledge that the flue from which the piece broke off was dangerous to work upon? Johnson, a boiler maker, did not know it, nor did the seven other witnesses know it. Must the ordinary care required of the railway company be such as to compel it to investigate and ascertain that which experts in a particular business do not know, and never heard of, especially in view of the fact that whether or not a flue would throw off pieces of itself could not be determined in advance of the actual attempt to install it in the flue sheet, and in view of the further fact that, of all the flues that had been so expanded, eight witnesses, including Johnson, had never heard of such an occurrence?"

A Montana case is very closely in point. In,

> Forquer vs. Slater Brick Co. 37 Mont. 426; 97 Pac. 843,

plaintiff claimed that a nozzle of the hose attached to the clay mixing machine was defective so that suddenly the full force of the water issued from the nozzle and

threw plaintiff's hands into the knives of the mixing machine. The court reversed a judgment for the plaintiff, and said:

> "No amount of testing would have apprized the defendant that such an accident as this was likely to happen. Indeed, as is suggested by defendant's counsel, a perusal of the plaintiff's narrative of how it did occur is sufficient to convince us that the defendant could not possibly have apprehended the happening of an event which seems to have taken place in opposition to elementary physical laws * * * Moreover, if recovery is sought because of a defective nozzle, there is no testimony as to how the accident actually occurred. There is no causal connection between the injury to plaintiff and any condition of the hose or nozzle. No jury could say what it was about the hose or nozzle that caused the accident. In this regard the case falls squarely within the rule laid down by this court (Cases cited). There must be some substantive testimony to justify a jury in returning a verdict for the plaintiff in such cases."

In,

> Canadian Northern Ry. vs. Senske, (CCA 8) 201 Fed. 637,

plaintiff was injured by a defective handhold on a foreign car. The exterior of the handhold disclosed no defect whatever, and a reasonable inspection would not have discovered the defect. The court held that there was no negligence upon which a recovery might be predicated.

Without detailing the facts in the following cases, we will simply refer to the citations for the Court's convenience.

> Mulligan vs. Montana Union Ry. 19 Mont. 135, 47 Pac. 795.

(Explosion of defective boiler; no liability).

Shankweiler v. B. & O. Ry. (CCA 6) 148 Fed. 195.

(Latent defect in brake rod; no liability).

Killman v. Palmer & Son Co., (CCA 2) 102 Fed. 224.

(Old crack in eye bolt; no liability).

Burbridge v. Utah L. & T. Co. (Utah) 211 Pac. 691,

(Defect in street car brakes; no liability).

Westinghouse Elec. Co. v. Heimlich, (CCA 6) 127 Fed. 92.

(Crystalized iron chain; no liability).

Lutgen vs. Stan. Oil, 287 S. W. 885 (Mo.)

(Latent defect in truck; no liability).

We submit that the foregoing demonstrates clearly that plaintiff has failed to prove negligence on defendant's part, even if we accept his theory of the accident. For this further reason, then, the court should have granted defendant's motion for a directed verdict, and the case should be reversed and dismissed.

III. PLAINTIFF ASSUMED RISK AS A MATTER OF LAW. As an affirmative defense defendant pleaded assumption of risk by plaintiff, and included this plea as one of the grounds of its motion for directed verdict (Tr. 234). It is peculiarly appropriate to this case, and rounds out our defense against plaintiff's claim.

The court will recall that plaintiff claims to be "well trained as a skilled mechanic," and also an experienced truck driver (Tr. 38; 50; 73); he further claims to have known more about the truck than any person in Deer Lodge but his father (Tr. 128). He described in detail all of its alleged defects and conditions. In other words,

he knew personally all of the facts which he contends charged defendant with knowledge of the danger from centrifugal force. Knowing the facts, the only thing lacking was appreciation of the danger, and this he of course denied (Tr. 119). He had to deny it, or he would have had no case.

The general rule on this subject is stated in,

39 C. J. 736:

> "In order to charge the servant with assumption of risks by reason of knowledge thereof, actual knowledge is not indispensable, but it is sufficient that the defects and dangers were so open and obvious that he should have known of the risks. Under these circumstances, the servant is presumed to have notice of the risks, and the law charges him with notice of the risks, whether he was actually aware of them or not, on the theory that one knows what it is one's duty to know, and he will not be permitted to say that he did not appreciate the danger."

Now, bearing in mind that plaintiff is a skilled mechanic and experienced truck driver, and also that he may not shut his eyes but must apply his training and skill as a reasonable man in going about his work, how can he consistently claim that defendant should have known and appreciated a danger which he himself should not have known and appreciated equally as well? Is defendant to be held to some higher degree of care than that exercised by a reasonably prudent skilled mechanic and experienced truck driver, already possessing full knowledge of the condition of the truck?

The case at this point presents a dilemma—if defendant should have known and appreciated the danger so as to be guilty of negligence, so should plaintiff, and he thereupon assumed the risk of what he did; on the other

hand, if plaintiff is not chargeable with knowledge of the danger, neither is defendant, and defendant was not guilty of the negligence charged. We can see no way by which plaintiff may avoid the full operation of one or the other of the above alternatives.

A perfect illustration of this is the case of,

Holland v. Pence Automobile Co., 72 Mont. 500, 234 Pac. 284.

There an expert mechanic was held to have assumed the risk of driving an automobile with a defective accelerator, the court assuming for the purpose of the decision that the automobile was defective and defendant negligent.

Plaintiff runs afoul of another equally well established rule of law, which is as follows:

39 C. J. 780.

"The rule that a servant has the right to rely upon the performance by his master of the duties imposed on him by law for the protection of his servants, is qualified by the further rule that, where a servant knows, or is charged with knowledge of defects and dangers in prosecuting the master's work, and continues in the master's employment voluntarily and without complaint, and without any promise that the defect will be remedied or the danger removed, he assumes the risk of any injuries which may result from such defect. The qualification above stated as operative in the case of knowledge actual or constructive on the part of the servant applies, notwithstanding the negligence and breach of duty of the master."

See also,

Russell v. Missouri Pac. R. R., (Mo.) 295 S. W. 102, certiorari denied 275 U. S. 571, 72 L. Ed. 421.

The moment plaintiff accepted employment as driver of the truck, he knew the conditions and dangers he faced better than any one else in Deer Lodge. Despite this, he worked for three or three and one-half days without notice or complaint to defendant. If ever there was a case made to order to fit the above rule, we submit that this is such a case. Common honesty and fairness require a servant to advise his master of defective machinery with which he is working, so as to give the master at least a chance to repair the defect before being mulcted in damages.

We quote another general rule affecting plaintiff's claim, from 39 C. J. 769:

> "The general rule is that, where the servant accepts or continues in employment, knowing or having equal means of knowledge with the master of the defects and dangers inherent in the employment, he assumes the risk of injury therefrom, even though the work might have been made safer by the master, the reason being that, under the circumstances, master and servant stand upon a footing of equality. For even stronger reasons, the servant accepts the risk where, from the nature of the employment and his duty in connection therewith, he has better knowledge or means of knowledge of the dangers of the employment than the master himself has."

The rule has been applied to cases of defective machinery, and if accepted by the Court at all, should be controlling.

Southern Turpentine Co. v. Douglass, 61 Fla. 424, 54 S. 385;

Wheeler v. Chicago, etc. R. Co., 267 Ill. 306, 108 NE 330; (Aff. 182 Ill. A. 194).

Roloff v. Luer Bros. Packing, etc. Co., 180 Ill. A. 127. (Aff. 263 Ill. 152, 104 NE 1093).

Mika v. Passaic Print Works, 76 N. J. L. 561, 70 A. 327.

Without briefing the cases in detail we will simply make reference to decisions which we deem closely analogous to the situation here presented.

Zeilmann vs. McCullough, 63 Atl. 368.

(Truck driver receiving injury from breaking of a pin; risk assumed).

Blair vs. Kinema Theatre, 272 Pac. 398.

(Plaintiff adjusting sign near ventilating fan climbing up protection bars; risk assumed).

C. N. O. & T. P. Ry. vs. York, 194 S. W. 1034.

(Experienced engineer in charge of stationary engine starting same by putting hand through spokes of fly wheel; risk assumed).

Ennis v. Maharajah, 49 Fed. 111.

(Unguarded cog wheel 3″ away from winch. Newer machinery guarded; risk assumed).

Detroit Crude-Oil Co. v. Grable, (CCA 6), 94 Fed. 73.

(Vibrating fly-wheel with projecting poles ½″ from water pipe catching on pipe and flying off. Risk assumed although precise occurrence not anticipated).

Wilkinson v. Tacoma Taxi Co. (Wash.), 293 Pac. 455.

(Car dangerous to crank because of defective timer; risk assumed).

SEE ALSO:

Stevens vs. Henningsen, 53 Mont. 306, 163 Pac. 470.
Paredia vs. Railroad, 123 Atl. 227.
Kalivas vs. Northern Pac. 165 Pac. 96.
Patterson vs. Railroad, 105 S. E. 746.

Concluding our argument on this point we submit that as a skilled mechanic plaintiff must be held to have known at least as much of the defective fan and danger of explosion as defendant; that he clearly continued to drive the truck in employment without notice or complaint to defendant; and that he was without doubt a servant who had knowledge of the current condition of the truck superior to defendant because it was in his sole, exclusive use, by reason of all of which plaintiff must be held as a matter of law to have assumed the risk of whatever injury he suffered. Therefore, the Court should have granted defendant's motion for directed verdict, and the case should be reversed and dismissed.

SECTION TWO.

IN ANY EVENT DEFENDANT SHOULD HAVE A NEW TRIAL.

Thus far we have set forth our several contentions for a reversal and dismissal of the case. If the court should hold that plaintiff was entitled to go to the jury, there still remain for consideration several serious errors which prejudiced defendant's rights at the trial. The court certainly realizes that defendant has made a strong showing, in any event, and that the case is so close defendant might well obtain a verdict in its favor if the jury were fairly instructed on the law and the evidence fairly commented upon. Therefore any considerable deviation from the proper course of trial must have been seriously prejudicial to defendant's case. We will now set out several instances of prejudicial error committed by the Court at defendant's expense.

I. ERROR IN DEFINITION OF PROXIMATE CAUSE AND FORSEEABILITY. Plaintiff alleged that the fan became jammed, obstructed and broke (Tr. 37; 49). That was the cause of his injury, he says, and is what he alleges defendant negligently failed to repair and inspect (Tr. 34; 47). By his witness Stubbs he sought to prove that the condition of the fan charged defendant with knowledge of the danger from centrifugal force (Tr. 112-117). As we have pointed out, however, he was unsuccessful in this. Now, plaintiff having voluntarily predicated his case upon this theory, with allegations and evidence to bear it out, defendant asked the Court to give the instructions contained in Specification 15 (Tr. 292) to the effect that defendant was not liable unless it could reasonably have foreseen that the fan would explode as plaintiff contended. The Court refused this and defendant duly excepted (Tr. 236). Thereupon the Court instructed the jury as set forth in Specification 25, (Tr. 297) to the effect that all plaintiff had to prove was that defendant should have foreseen some injury to someone using the truck, without any confining limitations at all. To this the defendant excepted (Tr. 273) without avail.

This was clearly prejudicial error of a most serious kind. Evidence of the general run-down condition of the truck was admitted "merely on the question of notice" (Tr. 100), and then over defendant's objection. Plaintiff did not even attempt to connect anything about the truck to his theory of the accident except the matters counsel included in his question to Stubbs (Tr. 112), i. e., wobbling, humming fan with worn bearings. Now for the

Court to take down all bars and tell the jury that if defendant might have foreseen injury to someone from attempting to crank the truck, or attempting to stop it, or steer it, or raise the dump body, or fill it with water, or any one of a hundred other things that one might do with an old truck and get hurt, it was liable for the consequence of centrifugal force even though no one could have discovered the danger thereof, is going entirely too far. The Court had no right to go clear beyond the limits within which plaintiff himself chose to try his case. Plaintiff is legally bound by the acts of negligence he alleges.

West vs. Wilson, 90 Mont. 522; 4 Pac. (2d) 469.

How can we now say whether the jury simply thought the truck was too old to use safely, and defendant might have anticipated some injury from some part of it and was therefore liable, or whether it actually found in favor of plaintiff's contention that danger of centrifugal force should have been foreseen? This instruction poses the crucial question in the case, so far as the jury is concerned. If defendant's liability is broadened clear beyond plaintiff's complaint and theory, as well as the evidence, how could it have had even a reasonably fair trial? There is no doubt about the rule of law that,—

> "Under general rules instructions must conform and be confined to the issues raised by the pleadings and evidence. * * * The right of recovery should be confined to the specific cause of action alleged in the declaration."
>
> 39 C. J. 1220, par. 1402.

This is the law in Montana.

St. John vs. Taintor, 56 Mont. 204, 182 Pac. 129.

It is also the law in the Federal Courts.

Arnall Mills vs. Smallwood (CCA 5) 68 Fed. (2d) 57

Denver Tramway vs. Anderson, (CCA 10) 54 Fed. (2d) 214

Grand Morgan Theatre vs. Kearney (CCA 8) 40 Fed. (2d) 235.

Therefore we submit that defendant's Instruction six, in Specification 15 (Tr. 292), should have been given by the Court, and defendant's exception to the Court's charge in Specification 25 (Tr. 297) should have been sustained. The jury was not correctly advised as to the law on foreseeability and proximate cause, to defendant's distinct prejudice and over its direct exception.

It should be borne clearly in mind that the question here is *not* whether under proper pleadings and proof defendant could be held liable simply for having furnished plaintiff an old truck. Rather, it is the distinctly different question of whether under the limited and particularized pleadings and proof found in this record, defendant may be held so liable.

II. ERROR IN ALLOWING DAMAGES FOR IMPAIRMENT OF EARNING CAPACITY. Defendant requested the Court to charge the jury that plaintiff had made no proof of loss of earning capacity (Tr. 239, Specification 24, Tr. 297), but the Court refused to do so (Tr. 236). Instead the Court instructed the jury that it might allow damages for loss of earning capacity, basing figures on expectancy of life and annuity costs (Tr. 257). When defendant excepted to this portion of the charge, the Court made a long and unjustifiable statement to counsel and the jury which in effect told them positively

that there was ample proof of damage in this respect (Tr. 301). Defendant in turn excepted to this statement (Tr. 302). The Court also told the jury that plaintiff's expectancy of life was 40 years, though there was no evidence to that effect, and attempted to justify the statement on the ground that Mr. Murphy of defendant's counsel had agreed to it (Tr. 300). It was finally agreed that the statement had been objected to as not applicable to this case, in the light of the evidence (Tr. 301). All of this is claimed as error in Specification 26 (Tr. 299).

No one will deny that before a plaintiff may claim damage for impairment to earning capacity, he must first produce evidence of the nature and extent of the impairment. Let us see what plaintiff produced. There is no dispute, of course, as to the extent of his injury, or that he had been a mechanic at times in the past. However, plaintiff did not prove:

1. How long he had been employed as a mechanic.
2. When he ceased to be so employed.
3. Why he ceased to be so employed.
4. What earnings he received as such.
5. Whether he sought employment at any place other than Gerrish Motors.
6. Whether he attempted to obtain any other kind of employment.
7. What he might earn at employment he could perform.
8. Whether his injury affected his skill as a truck driver, or prevented his performance of any kind of work except that of a mechanic.

9. Whether he had earned so much as a dime either before or after the accident.
10. What his expectancy of life was.
11. The cost of any annuity in a responsible life insurance company. (Tr. 121).

Despite this lack of proof, the court stated the following things not in the evidence:

1. Plaintiff earned $6.00 or $7.00 a day prior to the accident.
2. Plaintiff earned $5.25 or $5.50 a day at the time of the accident.
3. He could not obtain employment anywhere as a mechanic. (Tr. 301).

If anything could me more highly prejudicial and unwarranted than submitting the issue of loss of earning capacity to the jury upon such evidence, and then stating facts not in evidence to sustain it, at the close of all argument to the jury on both sides, we do not know what it could be. And a verdict of $3500.00 for an amputated fourth finger shows better than argument the inflaming effect it had on the minds of the jurors.

On the law applicable to this point of evidence necessary to warrant damages for loss of earning capacity, we cannot do better than to quote from Robinson vs. Woolworth Co., 80 Mont. 431, 261 Pac. 253. It was a personal injury case, plaintiff claiming permanent injuries disabling her from teaching school again. Defendant there asked just such an instruction as we asked in Specification 24, and for refusal to give it the Supreme Court reversed a judgment for plaintiff. The exact par-

allel between that case and the instant case is shown by the words of the court there:

> "Counsel for defendant urge as error the refusal of the court to give defendant's offered instruction No. B-13, as follows: 'You are instructed, in this case, that, the plaintiff having failed to produce any evidence in relation to the difference between her earning capacity prior to the accident and her earning capacity now, you cannot consider her loss of earning capacity in reaching a verdict in this case.'
>
> An instruction to that effect was given in Montague v. Hanson, supra. In the opinion in that case, this court clearly drew a distinction between a person's earning capacity and his ability to pursue his usual vocation. The opinion says: 'One of the elements to be taken into consideration was the disability to pursue his usual vocation. This element does not include compensation for loss of earning capacity. In a given case, the plaintiff's earning capacity may be so small as to be a negligible element in making up the estimate, yet the destruction of his capacity to pursue his established course of life is nevertheless a deprivation for which he is entitled to compensation.' One may prefer to earn a livelihood at his chosen vocation. The satisfaction is worth something. If wrongfully deprived of it, he is entitled to damages for such deprivation. Yet, his earning power may not be diminished; he may be able to earn as much at something else. In that event, while entitled to some damages for being deprived of the satisfaction of following his chosen vocation, he would not be entitled to any damages for diminished earning capacity. In this case, one physician gave testimony tending to show that plaintiff was disabled for teaching, because it would require her to be on her feet a great deal, but no medical or other witness testified how much plaintiff's earning capacity was diminished or that it was diminished at all. Plaintiff testified to pain and suffering and said she was not able to teach school but

> said nothing as to how much her earning capacity was diminished, if at all. In fact, the jury was left in the dark as to what was her earning capacity at the time of the trial but she must have had some, for she had been following occupations other than teaching. Inasmuch as plaintiff claimed permanent injury and disability, diminished earning capacity may be a serious factor but there is no evidence about it. We hold it was prejudicial error to refuse to give offered instruction No. B-13 and the error was accentuated by the giving of instruction No. 20-A-8, which expressly told the jury, if it should find for plaintiff and should find her injury or injuries to be permanent, it might take into consideration impairment of her capacity to earn money in future; this, in spite of the fact that there was no evidence of impairment of earning capacity in general or at anything other than teaching."

Therefore, we submit that prejudicial error was committed first when the court submitted the consideration of loss of earning capacity to the jury at all, and second, when the Court went so far outside the record in commenting and instructing the jury on the point.

III. ERROR IN REFUSING INSTRUCTION ON SCOPE OF PLAINTIFF'S EMPLOYMENT. Defendant requested the court to charge that if plaintiff went outside the scope of his employment in attempting to repair the truck, defendant was not liable (Tr. 238, Inst. 9). This the court refused (Tr. 236). This is specified as error in Specification 18 (Tr. 294).

The general rule on this point is stated in 39 C. J. 803, as follows:

> "Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice principal, and is injured thereby, the master is not liable."

In his complaint plaintiff alleges that he was employed to "*drive*" the truck (Tr. 28; 40). He testified:

"I was employed to drive a truck." (Tr. 117).

When he was injured he was not driving the truck but was repairing it, a distinctly different duty which he alleges defendant should have performed. Since he was employed as the driver, not a mechanic, he should have reported the defect to his foreman for repair. When a man is employed to do a certain job, his employer is not required to guard against the man's doing other and different duties. That is common sense.

So, here, defendant was not obliged to guard against what might happen to plaintiff except as to dangers reasonably arising from the driving of the truck, and not from the repairing of the truck. This conclusion is supported by all the decided cases.

In,

Sevanin v. Milwaukee Railroad, 62 Mont. 546, 205 Pac. 825,

an employee without instruction or authority from anyone placed a locomotive underneath an overhead air pipe which had become frozen, procured a torch, climbed upon the engine to thaw the pipe and touched the torch against the electric trolley wire so that he was electrocuted. The court held that the evidence of negligence was insufficient but that in any event plaintiff was acting without instructions and outside the scope of his employment. Therefore a judgment of nonsuit was affirmed.

In,

Therriault v. England, 43 Mont. 376, 116 Pac. 581,

plaintiff was employed to load clay pigeons into the traps

at a shooting club, which was in a small shed. He was looking through the cracks at the gunners, and was shot in the eye. The court reversed a judgment for plaintiff, holding that at the time of his injury he was acting outside the scope of his employment and not in the discharge of his duty.

In,

Kansas City Southern Ry. v. Self, (Okla.) 218 Pac. 833,

the plaintiff was told by his foreman to shut off the steam pipe in the boiler room, but instead of that he tampered with a valve at a joint in the pipe, receiving injury from escaping steam. There was no definite proof that the valve with which he tampered was defective, but there was no doubt about the escape of steam. The court reversed a judgment for plaintiff, holding that he had gone outside the scope of his employment and had violated his instructions.

The following are cases holding that where it is not the duty of the servant to repair the machinery with which he works, he acts outside the scope of his employment and assumes the risk of injury if he attempts to repair the machinery without orders from his employer.

Mellor v. Merchants Mfg. Co. (Mass.) 23 N. E. 100.

McCue v. National Starch Mfg. Co. (N. Y.) 36 N. E. 809.

International Ry. Co. v. Hall (Tex.) 102 S. W. 740.

Therefore we submit that in the light of plaintiff's own pleadings and testimony, defendant was at least entitled to have that defense submitted to the jury for

consideration, and that prejudicial error was committed when the court denied defendant's request for a charge to that effect.

IV. ERROR IN NOT INSTRUCTING ON PHYSICAL FACTS AND LAWS. By Instruction 15, defendant requested the court to charge that the jury should disregard testimony in conflict with physical facts or the law of nature (Tr. 239). This the court refused entirely (Tr. 236), and the subject was not mentioned in his charge. This point is raised by Specification 23. (Tr. 296).

We have already cited cases clearly establishing the correctness of the instruction as a legal principle. There is no reason whatever why it should not have been given, and it seems to us that there can be few cases where such a cautionary instruction is more appropriate. Most of the evidence in the case is made up of physical facts and laws of nature. Where the defense rest primarily on their controlling weight and significance, surely such a charge is fair and reasonable. How could the jury otherwise know that it had the legal right and duty to disregard plaintiff's oral testimony in favor of superior physical facts and laws? And as we said before, where the question is so close, as it is here, any charge not giving full effect to the claims of the parties has prejudicial effect and deprives them of a fair and impartial trial.

V. ERROR IN REJECTING PRESUMPTION THAT FAN WAS NOT DEFECTIVE. By Instruction 5, defendant requested the court to charge the jury that it is presumed that defendant did not furnish a defective

truck, or that if it did, it was not negligently ignorant of the defect (Tr. 237; Spec. 14, Tr. 291).

This is clearly the law, as shown by two Montana decisions in master and servant cases. In,

> Makarites vs. Milwaukee R. R., 59 Mont. 493, 197 Pac. 743,

it is held:

> "In Thompson on Negligence (second edition), section 3864, we find the following: 'In an action by an employee against his employer for injuries sustained by the former in the course of his employment from defective appliances, the presumption is that the appliances were not defective, and, when it is shown that they were, then there is a further presumption that the employer had no notice or knowledge of this act, and was not negligently ignorant thereof.' The defendant is entitled to the advantage of the presumption that he had performed his duty, until the contrary appears. (Forquer v. Slater Brick Co., 37 Mont. 426, 97 Pac. 843; Boyd v. Blumenthal & Co., 3 Penne. (Del.) 564, 52 Atl. 330.)"

There is no reason why this instruction should not have been given. The subject was not otherwise covered in the charge. On a question so close as defendant's constructive knowledge of the danger from centrifugal force, certainly defendant was entitled to the benefit of the presumption if the law gives it.

CONCLUSION.

While we believe other errors were committed against defendant at the trial, they are not as serious as those which we have argued, and we do not urge them upon the court.

We are in earnest in requesting the court to reverse and dismiss this case. We are frank to say that

in many years of practice we have never found as weak a plaintiff's case ripening into judgment in his favor. Here he has utterly failed to prove by legal evidence how his accident happened—this by virtue of the rules against evidence contrary to physical facts and laws, against a case resting on speculation and conjecture, and against a case built up by inference drawn from inference. Going further, he has similarly failed to prove proximate negligence of defendant by showing that ordinary care would have disclosed the danger of explosion from centrifugal force. Going further yet, he has failed to excuse himself from knowledge and appreciation of the danger at least equal to that of defendant, and must be said to have assumed the risk of this occurrence as much as defendant should have guarded against it.

If the court is unwilling to reverse and dismiss the case, nevertheless we think defendant's right to a new trial cannot be denied. The lower court's errors in broadening the rule on proximate cause far beyond both pleading and proof, in instructing and commenting upon loss of earning capacity without a word of evidenc to justify such action, in denying our whole defense of plaintiff's deviation from employment into repair work, and in denying our requested instructions on physical facts and the presumption in our favor, could not have failed to prejudice defendant's cause. These errors are

the more crucial because of the demonstrated strength of defendant's proof, which on a fair trial might well result in a verdict in its favor.

Upon these grounds the cause is

Respectfully submitted.

MURPHY & WHITLOCK
J. C. GARLINGTON
R. F. GAINES
Attorneys for Appellant.

Service of the foregoing brief by receipt of true copy is hereby acknowledged this.....day of July, 1936.

.....

.....
Attorneys for Appellee.

No. 8115

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

BRIEF OF APPELLEE

T. J. DAVIS,
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A. G. SHONE,
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BRIEF OF APPELLEE

It is not contended by the appellant that Clifford Gilbert intentionally placed his hand or any part of it through the openings in the side of the box or vane enclosing the rapidly revolving fan.

Of the third finger,

> "the bone was broken off and the finger was hanging by the cord; and the flesh on the little finger was torn away for approximately two-thirds of the length of the finger, or, I might say, scraped away from the bone."
> 119 R. 27 et seq.

The little finger, though without strength, remained attached for its full length.

> "the fan was revolving at medium speed." (119 R. 15.)

The fan, of course, was partially housed. If it is conceded, as it must be, that the plaintiff did not intend to stick his finger into the rapidly revolving fan, then the conception or hypothesis that such an injury was received by sticking his finger into the fan is not probable. It is scarcely believable. Were it affirmatively testified to, the Court would have to grant several new trials if a verdict and successive verdict involved such hypothesis. This proceeds from the common sense of all of us. It follows also from the testimony of George Shue, called by the railroad (a teacher of physics),

> "It would depend on what kind of an obstruction or stationary vane there was outside in order to state how far a man could stick in his finger with the fan revolving at six hundred revolutions a minute without the finger being cut off. In this particular fan he could probably put his finger straight in a matter of a fraction of an inch, because there is room to bend it down." (212 R. 5-12.)

Gilbert had on gloves. It was his right hand and had he, by clever adjustment of the finger, intentionally stuck his third finger into the revolving fan, the finger would not have been hanging by a cord at the end. It would have been cut in fragments, but no such carrying out of a well conceived plan of injuring his third finger and saving his second and index fingers,

would account for some injury to the little finger but no cutting of any part of it off by the fan. The clever hypothesis of counsel is based upon the coincidence that Gilbert happened to have on the finger that was cut, a cheap, metal ring of some kind. Truscott (134 R.) did not look down in the fan housing but coming from 100 feet away when the accident happened saw pieces of the fan out of the housing out in the splash pan.

The fine spun theory of the defense, built up and presented at the trial and cleverly presented by brief, arises from the coincidence of the metal ring on the finger that was badly injured. Rings are usually worn next to the hand. An expert for the defense is not so positive in his mind as counsel of the impossibility of the injury happening in the manner described by Gilbert. Quoting from a witness for the railroad:

> "If the fan flew apart, the pieces would have a tendency to go in the same plane or parallel plane of the revolution. One piece might hit another piece and drive it out of the housing or enclosing case. * * * I have known of other fans without the rim and with blades of mild steel that have crystallized to fly apart. You can tell by looking at steel when it is crystallized, but there is not a great deal of crystallization takes place in aluminum, although there is some."

Further, this witness being shown a piece of fan, said,

> "Down in the little cavity in that same piece that may be crystallization that is present and it may not. On this particular type of Mack truck the cooling system was never correct and that particular type of truck always heated. On this particular type of fan the placing of an outside rim on the vanes of the fan tends to strengthen the fan." (193 R. 8.)

The testimony of this witness on cross examination is instructive as to the speed of the perimeter of the fan being fifty-one or fifty-two miles an hour, probably, and that that would make a difference in his calculations and in his opinion as given on direct examination. This witness, however, on direct examination answered that it was not impossible but it does not seem likely that it could happen in the manner described by the plaintiff. (188 R. 18.)

The witness' testimony is also interesting as to the age of this particular truck and also as showing that the fan should have had a ring or band joining the tips of the outer ends of the vanes, such as was on a new type brought into exhibit by the defendant. (186 R. 20.)

The witness said that the truck was of an old model of which he had 350 under his charge at Coblenz, Germany, during the World War, but he did not know whether this was one of those particular trucks or not. (168 R. 15.)

This World War ended in November, 1918. The accident happened on October 30, 1933. The trial took place in 1935.

A witness brought the truck from Helena to Deer Lodge twelve years before the trial. (91 R. 8.)

It was used for three or four years after it came to Deer Lodge quite a bit, but after that not much. (91 R. 15.)

Of its idiosyncrasies prior to October, 1933, with reference to the fan belt, the shaft on which the fan revolved, and the fan itself, the testimony of a witness for the plaintiff is worthy of notice,

"Well, the fan belt was breaking quite often. The fan belt runs on a fly-wheel. The bearing in the fly-wheel was loose and it wobbled. It had a tendency to jump and break the belt. The belt set in a little groove, and the fan was a little loose, and if it would give a quarter of an inch it would bind that belt in that groove and break. I saw the belt break, I guess, ten or twelve times. It kept on breaking all the time, and we kept repairing it. I made a new one and that also broke. I do not know exactly the time at which this truck was delivered to the Milwaukee Railroad, but I know we towed it over there. We could not start it. The clutch was froze and we could not get the car in gear or out of gear, and we had to pull it over to the Milwaukee. I delivered the truck to the Milwaukee at the request of the Mayor of Deer Lodge. I cannot remember to whom I delivered the truck. I took it over to the Milwaukee and left it there. I believe Mr. Sears, the Master Mechanic, was there at the time. The body of this truck came from an old truck that was smashed by the Northern Pacific about fourteen years ago. At the time we took the truck to the Milwaukee it was impossible to start it without either towing it or allowing it to run down a hillside. I had seen people trying to start it previous to that, and we had tried for hours at a time to start. Practically every time we used it it was necessary to drag it through the streets of Deer Lodge in order to start it. Sometimes it would be necessary to drag it only a hundred feet, sometimes two blocks, and sometimes three or four. It had never been equipped with a self-starter. While it was supposed to be started by cranking, I do not believe it was possible to start it by cranking it unless it was awfully warm outside. Every time we took the truck out and ran it more than four or five blocks it boiled, and we would have to carry water with us. The day my son, the plaintiff, was injured, Mr. Sears came to the house and told me my son had been hurt. He said that while he had

not been hurt bad he had had his hand cut. I went to the doctor's office, and there I saw that my son's third finger was hanging down and the little finger was all cut. The third finger was removed, and while he still has the little finger, it does not amount to much." (92 R. 20-94 R. 5.)

There was a knocking in the truck, a kind of a grind. If the fan belt was on, the noise was present, but if the belt was off the noise was absent. This noise could be heard by the driver or by anyone. (97 R. 25.)

The truck had not been repaired in any way from the above outlined condition by the Milwaukee, since it had been towed over for its use. (97 R. 18.)

A witness, William Arthur, for the plaintiff, describes the truck's condition as of 1932,

"The Mack truck was an old dump truck. I operated the truck myself. At that time we had trouble starting it in the morning. It had no self-starter on it, and we would usually have to tow it a block before it would start. I do not know what year's model the truck was. The truck would heat when I drove it, and when I would drive it about eight or ten blocks I would have to put water in the radiator. With a load the truck would heat up in a distance of about three blocks. When the motor was cold the truck would jerk, but when the motor was warmed up it seemed to run fairly smooth. * * * I believe you could see a part of the fan from the driver's seat * * * four strips across the enclosure with space between the strips so that the fan was plainly visible * * * I think the fan belt broke twice while I was driving the truck." (98 R. 20-99 R. 17.)

"We would leave the truck at night, and the following morning it was at times necessary to drag it in order to start it. I do not remember of ever

having had to tow it more than a block to get it started during the time I drove it. We never primed it during the time I drove it because the primers were plugged up with dirt." (100 R. 29-101 R. 5.)

"When I was operating this truck it was winter time, and in the cold weather it was necessary to tow the truck about a block to get it started. Clifford Gilbert was not with me during any of the winter of 1932 while I was driving this truck. The radiator did not leak much. * * * However, the engine heated. * * * Mr. Gilbert, the plaintiff, did not ride with me while I was driving the truck. At the present time I am employed as a switchman by the Milwaukee Railroad, the defendant in this case." (102 R. 15-103 R. 4.)

Another witness, Clark Cutler, noticed that in 1933,

"The water in the radiator would heat and boil over and that they would have an awful time starting it. It had to be towed sometimes three blocks and sometimes less to get it started. * * * It seemed to run pretty good when it got going. (103 R. 24.)

"The truck would heat up whether it was climbing a hill or being run on the level, and the radiator had to be filled with water pretty often. They had to carry water with them to fill it. I do not know just how far the truck would run between fillings, but probably four or five blocks sometimes." (104 R. 13.)

James O'Neill, a witness for the defendant, says:

"If the fan flew apart, the pieces would have a tendency to go in the same plane or parallel plane of the revolution. One piece might hit another piece and drive it out of the housing or enclosing case. * * * I have known of other fans without the rim and with blades of mild steel that have crystallized to fly apart. You can tell by looking at steel when it is crystallized, but there is not a great deal of

crystallization takes place in aluminum, although there is some. On this particular type of Mack truck the cooling system was never correct, and that particular type of truck always heated. On this particular type of fan the placing of an outside rim on the vane of the fan tends to strengthen the fan." (192 R. 9-193 R. 16.)

Dr. Shue, expert physicist, for the defendant says,

"I have heard of the old-fashioned grindstone flying apart, and this was probably due to centrifugal force. I believe, too, that circular steel saws have been known to fly apart, and the cause of that would, in my opinion, be centrifugal force. Circular saws are made of steel. Structural steel has a tensile strength of something like fifty or sixty thousand pounds to the square inch, or, in other words, it has five or six times the tensile strength of aluminum. Tool steel has probably from five to fifteen times the tensile strength of aluminum." (203 R. 15.)

"Excessive heat would weaken it, and vibrating and shaking would have its effect. If the fan were revolving at from six to eight hundred revolutions a minute and were running out of its periphery, there would be a small amount of vibration which might have a tendency to weaken the fan." (204 R. 19.

Dr. Shue agreed with the Encyclopaedia Brittanica that, "At high temperatures aluminum is very weak, whilst after being heated for a few hours at 350° C. work-hardness is permanently lost." He agreed, also, that,

"Mechanical working deforms and partly shatters the original crystals, but subsequent heating causes recrystallization. When the degree of deformation and temperature of heating are suitable, some crys-

> tal grains grow at the expense of others, and, under carefully selected conditions, one grain alone may grow and thus convert large pieces of metal into a single crystal. Exaggerated grain size such as this is avoided in practice, metal showing this phenomenon being defective in mechanical properties." (205 R. 4.)

Perhaps more convincing to the lay mind than all of the testimony of experts is the fact that the ring *which the learned counsel say broke the fan,* and the finger which was inside of the ring, did not travel in that unswerving, infallible, and invariable law of force, described by counsel in the brief, in a plane at right angles to the axis of revolution, but the ring was around the young man's finger and the finger was hanging to the hand after he admittedly received the injury. (127 R.)

Gilbert noticed, on the morning of the accident, that some of the cylinders, or at least one of them, were missing. (123 R.)

The motor was running above the idling speed. (124 R.)

In looking for the trouble,

> "On opening the hood I discovered that the number four pet-cock, which is the rear pet-cock or the one nearest the radiator, was in an open position. This would have a tendency to cut down the compression and would interfere with the proper operation of that cylinder, as whatever went into the cylinder in the form of gas could escape through that opening." (125 R. 29-126 R. 6.)
>
> "When I was preparing to close this pet-cock I was standing at the left-hand side of the motor looking toward the front of the truck." (126 R. 21.)

"There was no difficulty or strain in reaching over to manipulate that particular pet-cock, and standing on the ground one would be able to reach it without losing one's balance or anything of that kind." (126 R. 29-127 R. 3.)

"As to how the accident occurred, I reached for the pet-cock and I was turning it off when something hit my hand and injured it, but as to just what occurred I had not then and do not now have any definite knowledge." (129 R. 22.)

"I recall definitely that I did not put my hand into the fan." (150 R. 16.)

'The revolving fan was approximately two inches inside of those guards or coverings. The openings between those guards were eight or nine inches wide, I imagine. There is no possibility that I stuck my hand through those openings and into the fan; and there was nothing in there that I had any purpose in reaching for." (131 R. 5.)

The witness identified the piece of the fan that was in the Mack truck on the day that he was injured. (131 R.)

Mr. Murphy asked, "How do you know that? You found it thirty days later, did you not?"

The witness answered, "Yes."

The witness says further,

"When I was first hurt I knew that the fan had broken, but I did not know just what had happened to it, except that the pieces hit my finger. Nothing that I know of or can account for happened just before the fan broke." (132 R. 13.)

ARGUMENT

The case went to the jury on intra-state commerce employment. The counts on inter-state commerce were dismissed. The following statutes have been in force in Montana since 1911,

> "Every person or corporation operating a railroad in this state shall be liable in damages to any person suffering injury while he is employed by such person or corporation so operating any such railroad, or, in case of the death of such employee, instantaneously or otherwise, to his or her personal representative, for the benefit of the surviving widow or husband, and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such person or corporation so operating such railroad, in or about the handling, movement, or operation of any train, engine, or car, on or over such railroad, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."
>
> 6605 R. C. M. 1935.

> "In all actions hereafter brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this act, the fact that the employee may have geen guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such person or corporation,

so operating such railroad of any statute enacted for the safety of employees contributed to the injury or death of such employee."

6606 R. C. M. 1935.

"An employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer."

6607 R. C. M. 1935.

Regardless of such statutes there was no assumption of risk in this case under the common law.

It is tiresome to multiply authority on when a particular state of facts does or does not demand that the court withdraw the case from a jury because of assumption of risk. The writer, having helped in the trial of both cases, believes that the facts for declaring the risk assumed as a matter of law were much more persuasive in a case of Williams v. Bunker Hill Co. (9th C. C. A.) 200 Fed. 211 than in the case at bar. The dialectics of appellant, too fine spun for juries or even judges to get much out of, are overruled in that case. Perhaps, it is as able and careful an analysis of this question as can be found anywhere.

There was no leaving the line of service for a youth hired to "drive" a truck when he lifted the hood to close a pet-cock through which "gas" (gasoline) was escaping. We suppose that if he had been carrying a spare tire and one running tire deflated on a trip that counsel would claim that he should not substitute the spare but

summon the master mechanic from the yard any distance away.

From the witness, Carl Zur Muehlen, for defendant, it is certain if the testimony is accurate, that the fan had a number of breaks in it. He found lines of cleavage that may have been made, he said, ten days or six months after the other breaks.

> "All I can say is that this break has been made since the other breaks occurred. This fresh break may have been made ten days or six months after the other breaks. I could not say how long after it was made." (168 R. 8.)

With our humble knowledge of physics, and looking at the lines of cleavage at various angles to a plane at right angles to the axis, we assert that a rapidly revolving fan, by means of these cleavages at various angles, could throw and would throw particles in any direction at right angles to the line of cleavage, or in a line which would be the result of the outward force made by the line of cleavage and the force asserted in the plane of revolution, but all such assertions are idle.

Truscott, one hundred feet away when the accident took place, went to the scene of the accident. He did not look down into the fan housing, but he saw parts of the fan outside of it in the splash-pan. The jury may well have believed that all of the pieces of the broken fan could have been produced if the defendant so desired.

Witness, Neumen, claim agent for the defendant, said that the parts that were broken from the fan were in a baggage-room in Butte. (217 R.) He says that,

"Mr. Sears did not hand those parts to me in Deer Lodge, nor did Mr. Jones or anyone else." (219 R. 18.)

Jones says that,

"Those pieces broken from Exhibit 3 were turned over to Mr. Neumen and kept by him some place. I do not know why they are not now in court." (162 R. 20.)

Sears says,

"Those pieces were gathered up and placed in a large envelope, which was kept in the office of the Company at Deer Lodge for probably sixty days or such a matter, and then the pieces were given to Mr. Neumen, the claim agent; and, so far as I know, Mr. Neumen took the pieces away with him." (145 R. 8.)

There was another circumstance not very savory to the jury. Dr. Unmack of Deer Lodge, the Company physician, was admitted by Mr. Murphy, for the railroad, to have been in Helena during some part of the trial but he was not called as a witness. (219 R.)

We hardly think, in view of the small size of the verdict, $3,500, that the assignment of errors concerning loss of earning capacity or on expectancy of life of the plaintiff, are worthy of answer on our part.

Instructions were perfectly correct, however, on these features. Instructions refused were properly refused. Specification 14 is as to the presumption of fitness, and that presumption has the force and effect of evidence. There is no room for presumption against evidence of unfitness as everwhelming as it was in this case from

the testimony of the witnesses both of plaintiff and defendant.

The offered instruction that the defendant should have known or reasonably expect that the fan would explode and cause injury to the driver of the truck does not state a correct principle of law at all. If the defendant had, on inspection, which was not made in this case, reasonable grounds to anticipate that the truck and fan and everything were so old and worn that it might break down and do some injury to somebody, not necessarily the driver of this particular truck, then the defendant had notice from which liability might arise. Where part of an instruction is erroneous, it is not incumbent upon the Federal Court to re-draft an instruction for counsel. The instructions as a whole, and they must be read together, were more than fair to the defendant. Few cases exemplify the rule better than this one that the presiding judge of the lower court is better able to judge of the effect of evidence than the appellate court. An interesting case on what the law in Montana is on the duty to furnish safe appliances, is Schroder v. Montana Iron Works, 38 Mont. 474, 100 Pac. 619. A chain, which a servant was using, broke and the servant was injured.

> "The master is not entitled to time to discover defects in things which are defective when put in use. He should examine them *before* putting them in use. He cannot evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the place, materials, etc., furnished by him."
>
> Shearman & Redfield on Negligence, Vol. 1, Par. 192.

A master may be liable if it installs an old radiator and subjects it to heavy pressure without previous test. Monarch Tobacco Wks. v. Northern (Ky.), 124 S. W. 36.

> "If an old, used radiator was installed by appellant without testing, and in defiance of the laws of steam engineering, resulting in a bursting of the casting and injury of an employee placed to work about it, the owner will be held liable. The cause of the explosion is as certainly and satisfactorily proven as it is possible ever to connect such an effect with its cause. The evidence is circumstantial, aided by the opinions of expert machinists whose experience has taught them the applied laws of mechanics."
>
> Monarch Tobacco Wks. v. Northern (Ky.), 124 S. W. 36.

An interesting case showing the difference between the duties of the master and the servant as to latent risks is Cox v. American Chemical Company (R. I.), 53 Atl. 871, 60 L. R. A. 629, which held that liability might accrue from the presence of poisonous gases in a sewer which the servant was sent to clean out, and that the known presence of evil odors was not sufficient to hold him to have assumed the risk.

Notice to the master is frequently charged from previous unsatisfactory operation of the instrumentality causing the injury. Burnside v. Novelty Manufacturing Co. (Mich.), 79 N. W. 1108; 3 Labatt's Master & Servant, Par. 1037. Interesting note is found in Georgia Railway Co. v. Dooly, 12 L. R. A. 3427.

The fact that this truck was furnished by the city of Deer Lodge to the Railroad makes no difference. The

master is liable for a defective appliance furnished by an independent contractor. Winston v. Commercial Bldg. (Iowa), 124 N. W. 330.

In the instant case we have evidence that the fan wobbled, heated up, was of great age, and had seen long service, and this came from a witness for the defendant, James O'Neill. He also said that the construction of the fan was not the best or approved construction, and if there had been an outside rim on the vanes of the fan, it would have a tendency to strengthen the fan. (193 R.)

If the law were to be made over again the Court might be moved by counsel's argument that in a case such as this where the father of the plaintiff knew that the truck was generally in bad condition such fact would absolve the master. The defect was clearly latent but could have been discovered by inspection. The common sense of the thing seems to be that the railroad should never have taken the truck into its service at all.

Mr. Labatt says,

> "The fact that the instrumentality in question had or had not operated in a satisfactory manner prior to the time when it caused the injury in suit has been admitted as competent evidence to establish either that it was or was not a suitable one to be used as a part of the master's plant, or that the master was or was not excusably ignorant of its abnormally dangerous condition, as disclosed by the accident."
>
> 3 Labatt's Master & Servant, Par. 1035.

> "But it is recognized in a large number of cases that the fact of such an accident's having occurred

is itself competent evidence tending to show that the master should have been aware of the conditions to which it was due. A jury, therefore, is always warranted in inferring from evidence of the previous defective operation of an instrumentality that the master was negligent in not seeing that the instrumentality was properly constructed and adjusted, so as to be safe when it was originally put in use, or in not discovering its dangerous condition and making it safe before the accident."

3 Labatt's Master & Servant, Par. 1037.

We do not think it would aid the Court in further prolongation of this brief. The cases are so numerous that text-books are preferable.

We respectfully submit that the judgment should be affirmed.

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No. 8115

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

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Reply Brief of Appellant

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..... Clerk.

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REPLY BRIEF OF APPELLANT.

On September 26 we received from counsel for appellee two briefs, one discussing our specifications of error occurring at the trial and the other dealing generally with the question of liability of the defendant on the merits. We will make very brief reply to them in the order given.

ERRORS AT THE TRIAL.

1. EXPECTANCY OF LIFE. The plaintiff confuses our position on this point. We do not contend that proper mortality tables and proof of expectancy of life are incompetent evidence in any case. Here, however, plaintiff introduced *no evidence whatever* as to mortality tables and expectancy of life, but requested the court to make up his evidentiary deficiency by judicial fiat. It is obvious that the cases cited do not meet or even mention such an irregularity.

2. EVIDENCE OF LOSS OF EARNING CAPACITY. The sum total of plaintiff's argument is that the evidence shows him to have been employed once as a mechanic, to have been employed as a truck driver when injured, and now not to be as able a mechanic as before. We do not deny that there is evidence to this effect. There is no evidence, however, of what wages plaintiff had ever earned or was earning as a truck driver. In substance, therefore, while plaintiff may have proved his "disability to pursue his usual vocation," he has in no way proved that his earning *capacity* is diminished. This is the precise distinction made in the case of

Robinson v. Woolworth Co.,
80 Mont. 431, 261 Pac. 253.

cited in our brief at page 55, and sought to be distinguished by plaintiff.

Plaintiff admits in his pleading that he is an experienced truck driver. Apparently his earning capacity in this field is undiminished by the injury. There is no proof of what his earning capacity in this acknowledged field was or now is. How, therefore, can the Court or the jury *assume* that this *must* be less than his earning capacity as a mechanic and allow him damages for the loss?

The plaintiff has adroitly selected one or two elements from our argument on this point for seeming reply in full, but his effort falls short.

3. FORESEEABILITY AND PROXIMATE CAUSE. The only authority cited by plaintiff against our position on this point is

> Heckaman v. Northern Pacific Railway Company 93 Mont. 363, 20 Pac. (2d) 258.

That was a flood damage case, based on the inadequacy of a drain in the railroad right of way, where it crossed a stream to carry off unprecedented cloudburst surface waters. The state of the pleadings and evidence in that case are so different from the instant case that no helpful analogy may be drawn.

The point we are urging is that since the plaintiff adopted the particular theory of disintegration by centrifugal force, and alleged negligence of the defendant in that particular, he cannot support such a theory by proving that defendant should have foreseen possible injury by reason of the condition of some other utterly unrelated part of the truck. We do not say that to be held

liable defendant must have foreseen the particular event that occurred, but we do certainly say that to be held liable defendant must have foreseen some injury to some one from the disintegration of the fan due to the conditions alleged by plaintiff.

4. PRESUMPTION OF NO DEFECT. Plaintiff's answer to our contention does not face the facts. There was a great conflict of evidence as to the alleged defective conditions of the fan and fan assembly. Against the bare testimony of plaintiff and his father, we produced the physical exhibits, together with uncontradicted proof of identical conditions. The exhibits show conclusively no evidence of wobbling, etc. as claimed by plaintiff. Therefore, the presumption of law was most important in the solution of this conflict by the jury, if the case is a proper case for the jury.

It will not do for plaintiff to say there was no conflict as to whether the motor heated and the truck wouldn't start easily and hence that there was no room for presumption. Such defects as those have no part in plaintiff's own theory of his case, and therefore are no reason why the requested charge should not have been given.

BRIEF SUBMITTED AT THE TIME OF ARGUMENT.

1. The caustic comment of plaintiff in closing his brief on the errors at the trial about "tedious citations" in an attempt to display false erudition rather comes home to roost on his supplemental brief on the merits. We have no complaint to make over many of the generalizations he has made as to legal principles of the law of negligence, procedure and practice, although we do not see

how they will assist the Court in solving the questions in this case.

There is only one point which deserves brief reply. In the first portion of his brief, he answers our argument of inherent impossibility by referring to the possibility of a ricochet. The evidence on this will not sustain a judgment. Plaintiff's expert witness did not even testify that a ricochet was possible. Our witness O'Neill was asked about it on cross-examination and said:

> "One piece *might* hit another piece and drive it out of the housing or enclosing case." (Tr. 192).

Continuing, however, he said:

> " . . . It is my opinion that a part of the fan could not be thrown out between the cross members on the radiator shell and strike the fingers of the driver of the truck who had his thumb and first and second fingers on the pet-cock. Of course, nothing is impossible, but it does not seem likely that this could happen." (Tr. 188).

Our witness Shue testified:

> "(If the pieces) should strike something it is possible that they would be ricocheted and deflected from a straight line. There are a number of places within the interior of the shell of the radiator where the tubes are bent as if they had been struck by some object." (Tr. 207).

Continuing, he said:

> "If the fan should fly apart by centrifugal force and the pieces should strike against each other and thus be changed from their plane of flight, I do not believe that the pieces in rebounding could exert a very great force at a position close to the axle of the fan." (Tr. 210).

Referring to the marks of bent tubes, these could have been as consistently, and certainly more probably, caused

by the binding of some broken pieces of the fan within the radiator resulting from the destruction of the vanes. (Tr. 198).

This is all the evidence on the ricochet feature. We know of no Court or case which has held that a judgment for a plaintiff in a case of this kind may be sustained by evidence consisting of one "might," later negatived, plus one "possible," which refers only to a possible "deflection" rather than the reversal of direction which plaintiff must prove.

2. ASSUMPTION OF RISK: At the oral argument we called attention of the Court to the case of

Matson v. Hines,
63 Mont. 214, 207 Pac. 474.

This case interprets Section 6607, Revised Codes of Montana, 1935, so as to make the defense of assumption of risk fully available in a case such as this. The Court held:

> "As a matter of law, in this state, an employee of a railroad company operating a railroad is deemed not to have assumed the risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer, (See 6607, Revised Codes 1921). However, the defense of assumption of risk may be interposed as a bar in an action for personal injuries of an employee, when such injuries have been caused by hazard which is incident to the particular business. When they have resulted from a hazard brought about by a failure of the employer to exercise the degree of care required of him by law to perform his primary duty to provide a reasonably safe place of work and reasonably safe appliances for the work, the defense is also available, provided the employee is aware of the condition of

increased hazard thus brought about, or it is so obvious that an ordinarily prudent person, under the same circumstances, would have observed and appreciated it.''

With these comments, the case is

Respectfully submitted,

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